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Global Upline Sdn Bhd v Kerajaan Malaysia

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 21C-2–05 OF 2013
MARY LIM J
30 OCTOBER 2015

C *Contract — Performance — Substantial performance — Whether plaintiff entitled to have certificate of practical completion issued and half of performance bond released on ground contract had been substantially performed — Whether construction of contract showed defendant wrong to insist works had to be 100% completed — Whether defendant's imposition of liquidated and ascertained*
D *damages ('LAD') on plaintiff's failure to complete works 100% by completion date invalid — Whether defendant failed to prove loss to be entitled to claim LAD and monies under performance bond*

The defendant contracted the plaintiff to carry out upgrading works on the
E Kota Kinabalu International Airport ('KKIA') so that it could accommodate larger aircraft such as the Boeing 747-400. The plaintiff's works ('the works') involved the construction of the airside infrastructure, a new air traffic control tower and a new low-cost carrier terminal. The parties entered into a supplementary agreement ('SA') which divided the works into sections 1, 2 and
F 3 each bearing different completion dates and payment of different rates of liquidated and ascertained damages ('LAD') if completion was delayed. The bulk of the entire works fell under section 1 which had to be completed by 30 April 2012. The works falling under sections 2 and 3 were minor and, from the stand taken by the defendant, did not impact on the issuance of a certificate
G of practical completion ('CPC') for the whole project. It was the defendant's case that if the plaintiff had completed 100% of the section 1 works by 30 April 2012, a CPC would have been issued and 50% of the RM36m performance bond the plaintiff had furnished the defendant under the contract, would have been released. Three days before the 30 April 2012 deadline, the defendant
H reminded the plaintiff that if section 1 was not fully completed by the scheduled date, LAD would be imposed. The plaintiff's stand was that by 30 April 2012, it had completed 98.81% of the section 1 works, so that by 1 May 2012 KKIA was able to operate on a 24 hour unrestricted basis to cater to Boeing 747-400 and other wide-bodied aircraft, which was what the
I defendant had wanted to achieve. Since the section 1 works had been substantially completed, the plaintiff asked the defendant to issue the CPC and release half of the performance bond. The plaintiff cautioned that if the CPC was not issued and LAD was imposed instead, it would cease all construction works and terminate the contract. The defendant, claiming that the section 1

works were not 100% completed by 30 April 2012, issued a certificate of non-completion ('CNC') and imposed LAD. Claiming that the defendant's action was repudiatory, the plaintiff terminated the contract and refused to carry out any further work including the section 2 and section 3 works. In due course, the defendant issued CNC and imposed LAD when the completion date for the section 2 works came to pass and thereafter it terminated the plaintiff's contract contending that the plaintiff was obviously not in a position to even complete the section 3 works in time. The defendant then called on, and received full payment under, the performance bond. In the instant suit, the plaintiff, inter alia, sought declarations that the defendant was in breach for failing to issue the CPC; that the imposition of LAD was wrongful and invalid; that the defendant should refund to the plaintiff the full amount under the performance bond and should also reimburse the plaintiff for costs it had incurred to secure Environment Impact Assessment ('EIA') reports necessitated by land reclamation works that had to be undertaken for extension of the airport runway.

Held, declaring the defendant to be in breach of contract by failing to issue the CPC and failing to release half of the performance bond to the plaintiff; declaring the imposition of LAD for section 1 works to be wrongful and invalid and the LAD for section 2 works to be invalid for lack of proof of loss; and ordering the defendant to refund RM18m of the performance bond to the plaintiff with interest at 5%pa from date of judgment to date of realisation:

(1) The plaintiff had proved its case on the law and the facts. It had achieved substantial completion of the section 1 works by the 30 April 2012 completion date to merit the issuance of the CPC and the consequential release of 50% of the performance bond. What the plaintiff had left outstanding, and there were some, the court was satisfied that such works did not affect the finding that the required works had been substantially completed. Such outstanding works were either minor and/or were not due as they formed or were related to section 2 and section 3 works. The defendant was in breach of the principal agreement by failing to issue the CPC and it had no right to impose any LAD for the section 1 works (see paras 90 & 137).

(2) From a reading of cll 43 and 48 of the principal agreement, it was clear the plaintiff was not required to achieve full or 100% completion before the CPC was issued. The parties had agreed that all that was required for completion within the intent and purpose of the agreement was 'substantial completion'. Where there was substantial completion, CPC might be issued. This was evident from cl 43(a) which clearly obliged the plaintiff to achieve substantial completion of the whole of the works by the completion date. The terms 'substantial completion' and 'practical

completion' used in the principal agreement were not only inter-related but were inter-changeable and meant or referred to the same thing (see paras 103–104 & 108).

(3) Aside from the percentage of completion levels that the court found proved, the court found that the reopening of the airport to operate on a 24 hour unrestricted basis from 1 May 2012 was relevant and material to the question of whether the plaintiff had achieved substantial completion of the section 1 works. The evidence showed the defendant was able to put the airport into 24 hour operation unimpeded and that it allowed Boeing 747 to land. The plaintiff's witnesses had adequately explained the defendant's concern was that the whole object or purpose of the works was to upgrade the existing facilities so that KKIA could cater for unrestricted operations of bigger aircrafts such as the Boeing 747-400 and that objective had to be met by the promised date of 30 April 2012. There was uncontroverted evidence before the court that the airport was indeed operating on such unrestricted conditions. The fact that the airport operated on unrestricted 24 hour basis surely meant that any of the works itemised in the CNC and in the defendant's subsequent letter of 28 May 2012 only related to outstanding minor works which did not render the other works which had been completed, not substantially completed (see paras 134–136).

(4) While the defendant was in breach of cl 48.2 in not issuing the CPC and releasing half of the performance bond, it failed to adduce any evidence to prove its loss to warrant its claim for LAD and the sum forfeited under the performance bond. The defendant was not entitled to forfeit the sum for want of proof. However, the court could not order the immediate return of the other half (RM18m) of the performance bond. The return or release of that half was governed by the terms of the performance bond itself, ie the sum had to be retained for 12 months after the end of the defects liability period. Since the plaintiff had completed the section 1 works, the sum had to be retained until that defects liability period had lapsed (see paras 144–147).

(5) Under the terms of the principal agreement, the costs of the EIA reports had to be borne by the plaintiff. The parties had agreed on the scope of works and that the plaintiff was responsible for both designing and building and ensuring that all laws were met. In doing so, the related costs were to be borne by the plaintiff (see paras 148 & 157).

[Bahasa Malaysia summary

Defendan telah memberi kontrak kepada plaintif untuk menjalankan kerja menaik taraf Lapangan Terbang Antarabangsa Kota Kinabalu ('LTAKK') agar ia boleh menampung pesawat yang lebih besar seperti Boeing 747-400. Kerja-kerja plaintif ('kerja') melibatkan pembinaan infrastruktur 'airside', satu

menara kawalan trafik udara yang baru dan terminal penerbangan tambang rendah baru. Pihak-pihak telah memasuki perjanjian tambahan ('SA') yang membahagikan kerja kepada seksyen 1, 2 dan 3 setiap yang mengandungi tarikh siap yang berbeza dan pembayaran kadar yang berbeza untuk ganti rugi jumlah tertentu dan ditentukan ('GTD') jika tidak menepati masa. Sebahagian besar daripada keseluruhan kerja tersebut jatuh di bawah seksyen 1 yang perlu disiapkan pada 30 April 2012. Kerja tersebut yang termasuk di bawah seksyen 2 dan 3 adalah kecil dan, berdasarkan pendirian yang diambil oleh defendan, tidak memberi kesan ke atas keluaran sijil siap praktikal ('SSP') untuk keseluruhan projek itu. Ia adalah kes defendan bahawa jika plaintif telah siap 100% daripada kerja seksyen 1 pada 30 April 2012, satu SSP akan dikeluarkan dan 50% daripada RM36 juta bon pelaksanaan yang telah dikemukakan oleh plaintif kepada defendan di bawah kontrak tersebut, akan dilepaskan. Tiga hari sebelum tarikh akhir 30 April 2012, defendan mengingatkan plaintif bahawa jika seksyen 1 tidak selesai sepenuhnya pada tarikh yang dijadualkan, SSP itu akan dikenakan. Pendirian plaintif adalah pada 30 April 2012, ia telah menyiapkan 98.81% kerja seksyen 1, oleh itu pada 1 Mei 2012, LTAKK boleh beroperasi 24 jam tanpa had untuk menampung Boeing 747-400 dan pesawat berbadan lebar yang lain, yang mana adalah apa yang ingin dicapai oleh defendan. Oleh kerana kerja seksyen 1 telahpun siap hampir keseluruhannya, plaintif meminta defendan mengeluarkan SSP dan melepaskan separuh daripada bon pelaksanaan. Plaintif memberi amaran bahawa jika SSP tidak dikeluarkan dan GTD dikenakan sebaliknya, ia akan memberhentikan semua kerja pembinaan dan menamatkan kontrak itu. Defendan, mendakwa bahawa kerja seksyen 1 tidak siap 100% pada 30 April 2012, telah mengeluarkan sijil tidak siap ('STS') dan mengenakan GTD. Dengan mendakwa bahawa tindakan defendan boleh ditolak, plaintif telah menamatkan kontrak itu dan enggan menjalankan apa-apa kerja selanjutnya termasuk kerja-kerja seksyen 2 dan seksyen 3. Dalam masa terdekat, defendan telah mengeluarkan STS dan mengenakan GTD apabila tarikh siap untuk kerja seksyen 2 berlalu dan berikutan itu ia menamatkan kontrak plaintif dengan berhujah bahawa malah jelas plaintif bukan dalam kedudukan untuk menyiapkan kerja seksyen 3 mengikut masa. Defendan kemudian telah memohon, dan menerima bayaran penuh, di bawah, bon pelaksanaan. Dalam guaman ini, plaintif, antara lain, memohon deklarasi bahawa defendan telah melakukan pelanggaran kerana gagal untuk mengeluarkan SSP; bahawa GTD yang dikenakan adalah salah dan tidak sah; bahawa defendan hendaklah membayar balik kepada plaintif jumlah penuh di bawah on pelaksanaan dan juga hendaklah membayar balik plaintif untuk kos yang telah ditanggungnya untuk mendapatkan laporan Penilaian Impak Alam Sekitar (PIAS') yang diperlukan kerana kerja-kerja penambakan tanah yang perlu dilakukan untuk pembesaran landasan lapangan terbang.

Diputuskan, mengisytiharkan defendan melanggar kontrak kerana gagal mengeluarkan SSP dan gagal melepaskan separuh daripada bon pelaksanaan

kepada plaintif; mengisytiharkan GTD yang dikenakan untuk kerja seksyen 1 adalah salah dan tidak sah dan GTD untuk kerja seksyen 2 tidak sah kerana tiada bukti kerugian; da memerintahkan defendan membayar balik RM18 juta bon pelaksanaan itu kepada plaintif bersama faedah pada kadar 5% setahun dari tarikh penghakiman hingga tarikh realisasi:

(1) Plaintif telah membuktikan kesnya berdasarkan undang-undang dan fakta Ia telah mencapai penyiapan hampir keseluruhan kerja seksyen 1 setakat tarikh siap 30 April 2012 itu untuk mewajarkan keluaran SSP dan lepasan turutan 50% daripada bon pelaksanaan itu. Baki yang plaintif tinggalkan, dan ada terdapat, mahkamah berpuas hati bahawa kerja-kerja tersebut tidak menjejaskan penemuan yang memerlukan kerja-kerja tersebut disiapkan hampir keseluruhan. Kerja-kerja yang tinggal adalah kecil dan atau belum masa untuk dikemukakan kerana ia membentuk atau berkaitan kerja-kerja seksyen 2 dan seksyen 3. Defendan telah melanggar perjanjian utama kerana gagal mengeluarkan SSP dan ia tiada hak untuk mengenakan GTD untuk kerja seksyen 1 itu (lihat perenggan 90 & 137).

(2) Berdasarkan bacaan klausa-klausa 43 dan 48 perjanjian utama, adalah jelas bahawa plaintif tidak perlu mencapai penyiapan sepenuhnya atau 100% sebelum SSP dikeluarkan. Pihak-pihak bersetuju bahawa apa yang perlu untuk disiapkan dalam niat dan tujuan perjanjian adalah 'substantial completion'. Di mana terdapat penyiapan yang substansial, SSP boleh dikeluarkan. Ini jelas daripada klausa 43(a) yang nyata mewajibkan plaintif untuk mencapai penyiapan yang substansial untuk keseluruhan kerja pada tarikh siap. Istilah 'substantial completion' dan 'practical completion' yang digunakan dalam perjanjian utama bukan sahaja saling berkaitan tetapi boleh ditukar ganti dan bermaksud atau merujuk kepada perkara yang sama (lihat perenggan 103–104 & 108).

(3) Selain daripada peratusan tahap siap yang mahkamah dapati telah dibuktikan, mahkamah mendapati bahawa pembukaan semula lapangan terbang untuk beroperasi 24 jam tanpa had dari 1 Mei 2012 adalah relevan dan penting kepada persoalan sama ada plaintif telah mencapai penyiapan yang substantial untuk kerja seksyen 1. Keterangan menunjukkan defendan mampu meletakkan lapangan terbang itu supaya beroperasi 24 jam tanpa halangan dan bahawa ia telah membenarkan Boeing 747 mendarat. Saksi-saksi plaintif telah menjelaskan secukupnya tentang kebimbangan defendan bahawa keseluruhan objektif atau tujuan kerja-kerja tersebut adalah untuk menaik taraf kemudahan sedia ada supaya LPAKK boleh menampung operasi tanpa had kapal terbang yang lebih besar seperti Boeing 747-400 dan objektif tersebut perlu dipenuhi pada tarikh 30 April 2012 yang dijanjikan. Tiada keterangan yang dipertikaikan di hadapan mahkamah bahawa lapangan terbang itu sememangnya beroperasi dalam keadaan

tanpa had. Fakta bahawa lapangan terbang itu beroperasi 24 jam tanpa had pada asasnya bermaksud bahawa apa-apa kerja yang diperincikan dalam STS dan dalam surat defendan seterusnya bertarikh 28 Mei 2012 hanya berkenaan kerja-kerja kecil yang tinggal yang tidak menyebabkan kerja-kerja lain yang telah siap, tidak siap secara substantial (lihat perenggan 134–136).

(4) Di mana defendan telah melanggar klausa 48.2 kerana tidak mengeluarkan SSP dan melepaskan separuh daripada bon pelaksanaan, ia telah gagal mengemukakan apa-apa keterangan untuk membuktikan kerugiannya bagi mewajarkan tuntutannya untuk GTD dan jumlah yang dibatalkan di bawah bon pelaksanaan. Defendan tidak berhak untuk membatalkan jumlah kerana perlu bukti. Walau bagaimanapun, mahkamah tidak boleh memerintahkan pulangan segera separuh lagi (RM18 juta) daripada bon pelaksanaan itu. Pulangan atau pelepasan separuh tersebut dikawal oleh terma-terma bon pelaksanaan sendiri, iaitu jumlah itu perlu ditahan selama 12 bulan selepas tempoh liabiliti kecacatan berakhir. Oleh kerana plaintif telah menyiapkan kerja bagi seksyen 1, jumlah itu perlu ditahan sehingga tempoh liabiliti kecacatan berakhir (lihat perenggan 144–147).

(5) Di bawah terma-terma perjanjian utama, kos laporan PIAS perlu ditanggung oleh plaintif. Pihak-pihak telah bersetuju tentang skop kerja dan bahawa plaintif adalah bertanggungjawab untuk kedua-dua reka bentuk dan bangunan dan memastikan semua undang-undang dipatuhi. Dalam berbuat demikian, kos berkaitan adalah ditanggung oleh plaintif (lihat perenggan 148 & 157).]

Notes

For cases on performance in general, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 6298–6300.

Cases referred to

Bolton v Mahadeva [1972] 1 WLR 1009, CA (refd)

Emson Eastern Ltd (in receivership) v EME Developments Ltd 26 ConLR 57, QBD (refd)

Hoenig v Isaacs [1952] 2 All ER 176, CA (refd)

Mariner International Hotels Ltd & Anor v Atlas Ltd & Anor [2007] HKCU 209 (refd)

P & M Kaye Ltd v Hosier & Dickinson Ltd [1972] 1 WLR 146, HL (refd)

Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817; [1995] 2 CLJ 374, FC (refd)

Westminster Corporation v J Jarvis & Sons Ltd [1970] 1 WLR 637, HL (refd)

Legislation referred to

Environment Protection Enactment 2002
Environment Quality Act 1974
Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 Schedule

Puteri Shehnaz Majid (Shasha Ravindran with her) (Cheah Teh Su & Assoc) for the plaintiff.
Khairul Fazly bin Kamarudin (Senior Federal Counsel, Attorney General's Chambers) for the defendant.

Mary Lim J:

[1] The plaintiff asked the defendant to issue a certificate of practical completion ('CPC') and the release of half of its monies held under a performance bond when it claimed substantial completion of the first of three sections of works that it was contracted to carry out for the defendant.

[2] The defendant refused. The defendant contended that the plaintiff 'should have completed the whole works of Section 1 before it can be said to fulfil the Substantial Completion Date as provided in Clause 43 of the said Contract'. Consequently, a certificate of non-completion ('CNC') was issued before the defendant finally terminated the contract.

[3] It is the plaintiff's case that there is no requirement under the contract itself for 'full completion' before CPC is issued. As a result of the defendant's wrongful termination which amounted to a repudiation of the contract, the plaintiff argued that it was discharged from its further obligations under the contract, including sections 2 and 3 works. In its statement of claim, the plaintiff seeks, inter alia, declaratory orders and damages including a sum of RM36m being the amount of the performance bond that ought to have been released.

FACTUAL BACKGROUND

[4] The factual background is substantially put together in the statement of agreed facts. This is how it all started.

[5] The defendant, the Government of Malaysia, wanted to upgrade Kota Kinabalu International Airport so that it could cater for unrestricted operations of bigger aircrafts such as the Boeing 747-400. Up until then, the airport was handling mainly scheduled operations, chartered flights and some general aviation flights. The airport had a single runway (Runway 20) of 2,988m (9,800ft) in length, a parking apron that can accommodate one B-747, two

AB-330, Three B-737 and four Fokker-50, a passenger terminal building, an air traffic control tower complex and other associated facilities that can handle aircraft up to Boeing 747-400. With the upgrading that included extending the runway (Runway 02) to a length of 3,780m with pavement strengths designed to cater for Boeing 747-400 having a frequency of at least 1,200 annual departures, and an extension of 1,474m of the existing main parallel taxiway to provide a full parallel taxiway system, and two high-speed exit taxiways, there would be unrestricted operations for these larger aircrafts.

[6] There were three packages to this whole project. The plaintiff was contracted to carry out only package 2 which involved the airside infrastructure, air traffic control tower and new low cost carrier terminal (the works). The total contract price for package 2 was RM720m. This contract price was revised to RM773,401,624.39 when several variation orders were issued in the course of the execution of the works.

[7] The terms and conditions of the plaintiff's contract with the defendant dated 1 August 2008 for the works, inter alia, required the contract to be read together with the following; namely the letter of acceptance dated 21 April 2006; the government needs statement for the development of Kota Kinabalu International Airport, Sabah, Malaysia; the conditions of contract and appendices thereto; the general and performance specifications and the appendices thereto; preambles, method of measurement, general requirements and preliminaries, schedule of rates, price breakdown and the appendices; and drawings ('principal agreement').

[8] Because the airport was an 'operational airport', the government needs statement specifically stated that extra care was required to coordinate the works so as to warrant a safe and smooth implementation of the project. The sequence of works had to be planned in such 'as not to disrupt the airport's operations and to exercise every care and precaution to prevent any incidents or accidents from occurring'. The defendant engaged KLIA Consultancy Services Sdn Bhd ('KLIACS') as its representative for the purposes of administering the principal agreement/works.

[9] Under the terms of the principal agreement, the plaintiff was required to furnish a performance bond worth RM36m representing 5% of the contract price. The bond was procured from Bank Pembangunan Malaysia Bhd.

[10] In the course of the works, there were five extensions of time ('EOT') granted by the defendant pursuant to the plaintiff's applications. With these EOTs, the original date of completion was extended as follow:

(a) EOT Certificate No 1 which was approved on 3 February 2009 granted an extension until 15 December 2009;

(b) EOT Certificate No which was approved on 24 December 2009 granted an extension until 19 May 2010;

(c) EOT Certificate No 3 which was approved on 3 June 2010 granted an extension until 1 July 2010;

(d) EOT Certificate No 4 which was approved on 28 June 2010 granted an extension until 18 March 2011; and

(e) EOT Certificate No 5 which was approved on 1 April 2011 granted an extension until 30 April 2012.

[11] In the course of the works, the defendant had also issued five taking-over certificates ('TOC') when the following works valued by the defendant at RM137,505,858.24 were completed:

(a) TOC No 1 dated 17 January 2007 certifying that the airside infrastructure, new air traffic control tower and new low cost carrier terminal building and the associated items were completed on 10 January 2007;

(b) TOC No 2 dated 2 September 2008 certifying that the Department of Civil Aviation ('DCA') Administration Building was completed;

(c) TOC dated 1 September 2009 certifying that the doppler vhf omnidirectional range ('DVOR') and distance measuring equipment ('DME') were completed;

(d) TOC No 3 dated 2 February 2009 certifying that the air traffic control tower building, its facilities building and part of apron were completed; and

(e) TOC No 5 dated 20 October 2011 certifying that taxiway lima, golf, charlie and part of northern apron of Terminal 1 were completed.

[12] A portion of the new extended Runway 02 including the foundation for the approach lights was to be constructed offshore. This involved reclamation works which meant that the approval of the Environmental Protection Department of Sabah ('EPD') was required. The plaintiff had submitted an assessment of the hydraulic impacts from approach light foundations report ('the report') to EPD for this purpose. On 13 February 2007, EPD gave its approval subject to certain conditions.

[13] Towards the end of the fifth EOT, issues arose in relation to the construction of the precision approach lights ('PAL') for Runway 02. The plaintiff's initial method of construction of the foundation for the PAL

involved the use of a piling barge to construct offshore platforms to uphold the PAL. However, the seabed of the area where the platform was to be constructed had to be dredged because it was shallow. In its letter dated 9 June 2010, EPD imposed additional conditions to deal with this matter of substantial dredging works of the seabed.

[14] On 2 August 2010, EPD told the plaintiff that based on complaints from the public on the offshore works, the results of the joint inspection conducted on 30 July 2010 and EPD's review of the report, EPD found that the information in the report was inaccurate and did not reflect the true condition at the site. EPD then replaced the additional conditions with new conditions after requiring a supplementary environment impact assessment study to be conducted. Those additional conditions being:

(a) construction of the PAL must use an environmentally friendly method which does not involve any dredging of the seabed sand or sand in the Kuala Sungai Petagas area; and

(b) the plaintiff must inform EPD of the construction method to be adopted before construction of the PAL.

[15] On 27 August 2010, the plaintiff proposed an alternative method of construction. Instead of using a piling barge to construct offshore platforms to uphold the PAL, temporary staging where temporary steel staging as a working platform was proposed. EPD approved this alternative method on 31 January 2011. The additional costs of this alternative method was estimated to be around RM15,291,838.

[16] The parties exchanged a series of letters (dated 7 February 2011, 14 April 2011, 27 April 2011, 21 June 2011 and 3 January 2012) over the completion of the works before finally deciding on 17 January 2012 to enter into a supplementary agreement ('SA') for the construction of the PAL. The parties met to discuss the draft SA on 7 March 2012. On 13 March 2012, the SA was drawn up and signed. Under the terms of the SA, the works were now divided into three sections; namely section 1, section 2 and section 3 with different completion dates; and different rates of LAD imposed in the event of any delay in completion of any of the sections.

[17] Section 1 works was where the problem started. The plaintiff was required to complete these works by 30 April 2012. The plaintiff claimed that it had substantially completed whereas the defendant viewed otherwise.

[18] By letter dated 27 April 2012, the defendant informed the plaintiff that liquidated and ascertained damages ('LAD') will be imposed if section 1 works were not completed by 30 April 2012. The plaintiff treated this letter as

amounting to an anticipatory breach of contract because the defendant's representative had acknowledged at the monthly progress meeting a few days earlier on 24 April 2012 that the plaintiff had completed 93.85% of the whole of the works as at 23 April 2012. By 30 April 2012, this had reached 94.17%. By this time, the plaintiff had also been paid a total amount of RM721,632,313.67. Insofar as section 1 works are concerned, the plaintiff claimed that it had completed 98.81% which by 21 May 2012 had reached 99.36%. By 1 May 2012, the KKIA was operational on a 24 hour unrestricted basis, which the plaintiff claimed was what the defendant wanted.

[19] So, by letter dated 2 May 2012, the plaintiff asked the defendant to reconsider as the defendant's intention 'would have effects of profound gravity' while at the same time put the defendant on notice that if the CPC was not issued and LAD was instead imposed or deducted from the interim payment, the plaintiff would cease construction and terminate the contract. On 23 May 2012, the plaintiff wrote to the defendant applying for the issuance of the CPC and for the performance bond to be reduced by 50%.

[20] The defendant issued a CNC on 25 May 2012. The CNC listed out the outstanding works as at 30 April 2012; and the defendant imposed LAD of RM2,598.34 per day beginning 1 May 2012 for section 1 works. The plaintiff claimed that the defendant is in breach of the principal agreement in failing to issue the CPC as the plaintiff had completed 99.36% of section 1 works as at 21 May 2012 and only less than 1% of the section 1 works remained outstanding. The plaintiff also alleged that the defendant's failure to issue the CPC upon such completion is tainted with mala fide. The defendant's project manager, one Mohd Fadhil Ramli had verbally informed the plaintiff's deputy managing director, Michael Ting that the defendant's representative had recommended the issuance of the CPC and had in fact prepared one. The CPC was however, withdrawn on instructions of the Setiausaha Bahagian Pembangunan of Ministry of Transport who instructed a CNC to be issued instead. By letter dated 7 June 2012, the plaintiff terminated the contract and ceased all substantial works.

[21] On 4 October 2012, the defendant issued a CNC in respect of section 2 works followed by the imposition of LAD of RM4,362.74 per day beginning 1 September 2012. On 14 December 2012, the plaintiff received a notice of intention to terminate the employment of contractor. In that notice, the defendant alleged that the plaintiff had failed to complete sections 1 and 2 works within the time stipulated in the contract. The defendant further stated that it would appear that the plaintiff would not be able to complete section 3 works either. The plaintiff was given 14 days to remedy its alleged breaches failing which the defendant would terminate the contract.

[22] On 26 December 2012, the defendant issued a notice of termination with effect from 31 December 2012. On 8 January 2013, the defendant called on the performance bond. The bond was duly released by the bank. The defendant then went on to impose LAD in respect of sections 1 and 2 works from 1 May 2012 to 31 December 2012.

[23] In this suit, the plaintiff seeks a declaration that the defendant was in breach by failing to issue the CPC; that the imposition of LAD is wrongful and invalid and amounts to a penalty; that special damages of RM36m being the performance bond sum should be ordered against the defendant; and that the defendant reimburse the plaintiff for the costs of the EIA reports (for proposed sea reclamation; proposed obstruction clearance; supplementary EIA for the proposed obstruction clearance (blasting activity); and supplementary EIA for the proposed sea reclamation (PAL)). This claim was rejected by the defendant on 27 February 2012 on the basis that such expenses are to be borne by the plaintiff under the terms of the principal agreement.

[24] The plaintiff had also alleged that the defendant had agreed to issue the CPC but that the decision had been retracted on bad faith. The plaintiff is also claiming a sum of RM6,724,493.10 as profits lost by reason of the termination. There were also claims for general damages although this together with the claim for profits has since been abandoned.

[25] The defence in essence is that the plaintiff is in breach of the terms and conditions of the SA. The defendant claimed that the plaintiff is not entitled to the issuance of the CPC because the plaintiff is itself in breach when it failed to complete section 1 works on the date contractually agreed, that is 30 April 2012. The defendant has also counterclaimed for LAD.

ISSUES

[26] There are two agreed issues for determination:

(a) did the plaintiff achieve practical or substantial completion of section 1 works on 30 April 2012?

  (i) if so, was the defendant in breach of contract by failing to issue the CPC and failing to release 50% of the performance bond to the plaintiff?

  (ii) if not, did the defendant nevertheless hold out or represent that it will issue the CPC and release 50% of the performance bond to the plaintiff upon completion of section 1 works?

(b) who ought to bear the costs for the EIA reports set out in para 51 of the statement of claim?

[27] The determination of the first issue will determine the right and thereby the validity of termination; whether it is the plaintiff or the defendant who has the right to terminate; and the position of the consequential reliefs sought. The second issue is an entirely separate issue which is not dependent on the first issue.

First issue: Did the plaintiff achieve practical or substantial completion of section 1 works on 30 April 2012?

[28] It is the plaintiff's submissions that the plaintiff had indeed achieved practical or substantial completion of section 1 works on 30 April 2012. The plaintiff relies on the terms of the principal agreement, the SA together with the evidence of the witnesses called by both parties, for such a proposition. Consequently, the plaintiff argues that the defendant is in breach of contract by failing to issue the CPC and by failing to release 50% of the performance bond to the plaintiff. In the event the court is not with the plaintiff in the answer to this first proposition, the plaintiff argues that the defendant nevertheless held out or represented that it will issue the CPC and release 50% of the performance bond to the plaintiff upon completion of section 1 works. In short, the plaintiff argues that there is a 'Holding-Out Agreement' to the like effect.

[29] In relation to the principal agreement and the SA, the plaintiff relies on various provisions such as cll 1.1, 43(a) and 48.2. As for the holding-out agreement, the plaintiff claims that there was an agreement or understanding between the parties that if the plaintiff were to complete section 1 works by the extended completion date of 30 April 2012 with a buffer of three weeks to complete the minor outstanding works by 21 May 2012, the defendant would issue the CPC and release 50% of the performance bond; and that sections 2 and 3 works would be considered as outstanding works under the contract.

[30] According to Michael Ting Sie Ping ('PW1'), the plaintiff's deputy managing director, this agreement or understanding stems from a meeting between the parties on 17 January 2012 and is reflected in documents and conduct of the parties. That meeting on 17 January 2012 was to discuss the EPD issue. Apart from the parties, there were representative from MOT, KLIACS and the Department of Civil Aviation. PW1 testified that the plaintiff's proposal of the alternative method of constructing the offshore PAL was a 'long outstanding key issue and could jeopardise completion date which was only in a few months' time on 30.4.2012. It was agreed that the plaintiff and the Defendant would enter into a supplementary agreement to address construction of the offshore PAL and to deal with the remaining works under the Contract'.

[31] PW1 testified that the plaintiff was expected to achieve substantial or practical completion by 30 April 2012 and not, full completion as claimed by the defendant. On the matter of the completion date, PW1 testified that the parties 'agreed that the supplementary agreement would divide the remaining works under the contract in three stages or sections, each with their respective completion dates'.

[32] As for the issuance of the CPC, PW1 said that 'the Defendant was not minded to extend or shift the completion date of the Contracts beyond 30.4.2012 by issuing another Extension of Time (EOT) Certificate. The plaintiff therefore proposed to keep 30.4.2012 as the completion date to complete remaining works under the Contract (excluding Runway 20 works and offshore PAL) but requested that CPC be issued upon completion and 50% of the performance bond be released'. The plaintiff confirmed its understanding of the arrangements vide letter dated 20 January 2012 to the Secretary General of the Ministry of Transport (MOT). There was no reply from the defendant although there was a letter from the defendant on 10 February 2012 dealing with the Ministry of Finance's approval of the proposed changes in relation to the construction of the PAL and that a supplementary agreement would be drawn up between the parties.

[33] PW1 testified that as at 30 April 2012, '94.17% of the whole of the Works was completed ... according to the plaintiff's Weekly Progress Report No. 304 at p 11 of D'. As for section 1, the plaintiff had 'completed 98.81% ... by 30.4.2012'. The latter % was not made known to the defendant because it was calculated 'internally for purposes of this case. Ismail Jusoh calculated it'. PW2 further testified that KKIA became operational on a 24 hour unrestricted basis on 1 May 2012.

[34] PW1 told the court that 98.18% 'definitely' amounted to substantial completion of section 1 works; and that the airport could not be fully operational on a 24 hour basis from 1 May 2012 'if Section 1 Works were not substantially completed on 30.4.2012. More importantly, you have to see whether the outstanding 1.19% comprises the occupation and operations of the airport. There is no rule as to what percentage amounts to substantial completion. In this project, the outstanding 1.19% is totally immaterial to usage and occupation as intended by the Defendant'.

[35] In further support of the plaintiff's case, PW1 alluded to MOT's letter to DCA where MOT pointed out that 'the plaintiff's failure to complete section 1 works by 30 April 2012 will mean that the runway will not be fully open and the airport will not be able to operate on a 24 hour basis. So the fact that the runway was fully open and the airport was operating on 24 hour basis

by 1.5.2012 must mean, by MOT's own statement here, that the plaintiff had substantially completed Section 1 Works'.

[36] PW1's testimony was shared by Ismail Jusoh ('PW2'), its contract manager cum quantity surveyor ('QS'). Before he joined the plaintiff, he was in fact a QS at KLIACS from 2002 to 2010. He did not attend the meeting of 17 January 2012 but he claims to be aware of this holding-out agreement or understanding from the correspondence exchanged between the parties which he had access to as the plaintiff's contracts manager.

[37] On the completion of section 1 works, PW1 testified that as at 30 April 2012, he calculated the plaintiff's works on section 1 to have achieved 98.81% completion – see p 129 of Bundle D. PW2 explained the format of his calculation which he said was the same as that used when he explained to KLIACS' Deputy Manager, Lau Ooi Ling on 25 May 2012 vide email seen at pp 220–225 of Bundle B2. By that time, the plaintiff's completion level was 99.36%.

[38] According to PW2, 'the format was computed based on the overall physical works progress that was reported to KLIACS in Progress Weekly Reports and Progress Monthly reports. In deriving the percentage of sectional progress for Section 1, works items under physical works were re-appointed to reflect actual works that fall within Section 1, Section 2 and Section 3 of the SA'. The defendant was advised on this completion through PW2's email dated 25 May 2012. According to PW2, KKIA became operational 'with 24 hour unrestricted basis' on 1 May 2012.

[39] Learned senior federal counsel argued on behalf of the defendant that this was a design and build contract where the defendant is relying on the skill and expertise of the plaintiff. In this project, the plaintiff was said to be fully aware that the implementation of the project shall be in an active airport environment as provided in cl 8.5(e) of the principal agreement.

[40] The defendant accepts that the plaintiff was required to complete the principal agreement by 30 April 2012. However, the parties had entered into the SA in which the works were divided into three sections. As far as section 1 is concerned, the plaintiff was required to complete the whole of section 1 works by 30 April 2012. By this, the plaintiff was required to complete the works under Schedule C of the SA as found in p 399 of Bundle A2.

[41] The defendant submitted that by 30 April 2012, the plaintiff had completed 94.17% of the whole of the works for the project. This was however, not within the terms of SA; hence the termination of contract. The defendant contended that the plaintiff's justification of their achievement and

completion of section 1 works vide letter dated 7 June 2012 showed that the plaintiff had still failed to complete section 1 works by 30 April 2012. In some of the works, the plaintiff had only completed 70% as at 4 June 2012. Hence, learned senior federal counsel submitted that to 'answer strictly to the 1st issue, based on the plaintiff's own letter it clearly showed that the plaintiff had failed to complete their works by 30.4.2012'.

[42] As for the matter of the CPC, that can only be issued when the whole of the works have reached practical completion and the project director ('PD') is satisfied with the works done. The practical completion must then be certified by the PD and the date of practical completion will be the commencement date for the defects liability period under cl 48.2 of the principal agreement.

[43] The defendant called three witnesses to support its contentions: Jamiah bt Jahis ('DW1'), the General Manager of KLIACS; Easparan a/l Munusamy ('DW2'), the Secretary to the Development Division at the Ministry of Transport, Malaysia; and Mohd Fadhil bin Ramli ('DW3'), the project manager at the material time.

[44] DW1's testimony was substantially about the EIA report although on this first issue, she did testify that the plaintiff had not achieved practical or substantial completion by 30 April 2012. According to DW1, this is because testing and commissioning ('T&C') under cll 1.1, 48.2, 48.7 and 37A had yet to be conducted.

[45] Under the principal agreement, 'the PD' or 'Project Director' is represented by the Secretary General or Ketua Setiausaha of the Ministry of Transport – see cl 48.2 and Appendix 1 of the principal agreement. DW2 was in court to basically testify on behalf of the PD. DW2 testified that he chaired a meeting on 7 March 2012 to discuss the details of the SA. Amongst the details discussed was that the whole of section 1 works had to be completed by 30 April 2012 for a conditional CPC to be issued and 50% of the performance bond to be released. The minutes of the meeting can be found at pp 27–30 of Bundle C.

[46] At a subsequent meeting on 9 March 2012, the meeting was told that the defendant's 'Pengurusan Atasan Kementerian' had agreed to an issuance of a conditional CPC if the section 1 works were completed by 30 April 2012; and that works under section 2 and section 3 would be treated or considered as 'outstanding works'. DW2 testified that the defendant was advised by KLIACS through its letter dated 25 May 2012 that the plaintiff had failed to complete as required. The T&C for the section 1 works had yet to be done. This was also the testimony of DW1. The details of the section 1 works which had not been completed are set out in Appendix 1 to KLIACS' letter of 25 May 2012. A

CNC was then issued. Consequently, CPC under cl 48.2 could not be issued. Neither could 50% of the performance bond be released.

[47] The defendant claimed that all this meant that the plaintiff was in delay and that it was entitled to impose LAD of RM2,598.34 per day from 1 May 2012 after the issuance of a CNC on 1 May 2012. The defendant also found the plaintiff to be in delay for the section 2 works which were required to be completed by 31 August 2012. KLIACS issued a CNC on 4 October 2012 and the defendant imposed LAD at the rate of RM4,362.74 per day from 1 September 2012. As for the section 3 works, these works were also not completed by 31 December 2012. the defendant then decided to exercise its rights under cl 40 and terminate the principal agreement. A notice was duly issued on 31 December 2012; and the performance bond later called.

[48] On the matter of the 24 hour operations of KKIA, DW2 testified that during the entire duration of the works, the airport was closed for six hours each day to enable the plaintiff to carry out the works. On 1 May 2012, KKIA was allowed to operate on a 24 hour basis. Although DCA and Malaysia Airport Sdn Bhd ('MASB') had confirmed and allowed the airport to operate on a 24 hour basis, the defendant said that the airport used existing equipment and infrastructure because the plaintiff had not completed its works. Therefore, it was submitted that the 24 hour operation did not mean that the plaintiff had fulfilled its contractual obligations.

[49] DW3 testified that at the site meeting No 59 of 24 April 2012 (p 43 of Bundle C), the plaintiff was reported as having only completed 93.85% of section 1 works as at 23 April 2012 when it ought to have completed 99.93% by this date. This resulted in a 204 day delay which is shown from revision 4 overall work programme (OWP) – see pp 43–50 of Bundle C. DW3 also testified that the plaintiff had only achieved 94.17% of the whole works as at 30 April 2012 – see p 119 of Bundle D.

[50] As for section 1 works, DW3 testified that the plaintiff had emailed the resident engineer ('RE') on 25 May 2012 of its completion of 99.36% of the section 1 works as at 21 May 2012. The RE sought details of the plaintiff's progress of works but the plaintiff refused taking the position that it was not obliged to for section 1 works. In any event, the defendant had valued section 1 works and found that the plaintiff had only achieved 98.80% completion as at 13 June 2012 – see minutes of site meeting No 61 held on 28 June 2012 at pp 57–63 of Bundle C. By 23 July 2012, the plaintiff had only achieved 98.91% completion – see minutes of site meeting No 62 found at pp 64–69 at Bundle C. All this meant that the plaintiff had not completed the section 1 works.

[51] Like DW2, DW3 testified that the 24 hour operation of the airport was not indicative that the plaintiff had completed the section 1 works as agreed. The defendant was of the view that the plaintiff was in substantial delay in which case, LAD was imposed. The list of outstanding works for section 1 can be seen set out by the resident engineer in his letter dated 27 April 2012 to the plaintiff – pp 203–204 of Bundle B2. With all these outstanding works, DW3 informed the court that the plaintiff was not entitled to both the CPC and the release of 50% of the performance bond.

[52] It was further the evidence of DW3 that in order for CPC to be issued, the plaintiff had to notify the defendant of the area and location which would be handed over to the defendant. A joint inspection would then be conducted to verify the plaintiff's works. Proper documentation was also required before the consultants would recommend the issuance of CPC. The defendant claimed that the plaintiff did not comply with this requirement. Hence, the plaintiff was not entitled to CPC.

FINDINGS OF THE COURT

[53] It is the plaintiff's contentions that it has successfully completed section 1 works whereas the defendant says otherwise. When both did not get the response they respectively sought, both separately terminated the principal agreement and the SA. The completion of performance under contract is integral to parties' rights and obligations. The breach of that obligation will give the innocent party the right to terminate.

[54] The plaintiff's claim of substantial or practical completion warranting the issuance of CPC is said to be supported by its claim that it has achieved levels of completion of the relevant works which reflects such substantiality. It is the plaintiff's case that the outstanding 1.19% works are not major but minor works which have not compromised the occupation or operations of the airport. Although there is no hard and fast rule as to what percentage amounts to substantial completion, for the purposes of this project, the outstanding 1.19% is 'totally immaterial to usage and occupation as intended by the Defendant'. The plaintiff, inter alia, relies on the fact that the airport went into 24 hour unrestricted operations the very next day after the date of completion, that is, 1 May 2012, as further proof of its claim that it had substantially completed the section 1 works and is thereby entitled to CPC and release of part of its performance bond.

[55] The defendant on the other hand, seems to suggest that the completion must be full or 100%. No particular percentage or level of completion save what was in the overall works programme ('OWP') revision 4 was offered as the appropriate benchmark or evidence of non-achievement of completion as

required. Because the levels achieved are not the levels expected in the OWP, the defendant says the plaintiff has not achieved the completion required. As for the operation of the airport, the defendant says that the airport had always been in operation save for the six hour daily closure to enable the plaintiff to carry out its works. The airport remained an active airport throughout the works. Hence, nothing was to be made of the return to operations.

[56] These are the relevant events leading up to the termination by both parties.

[57] Prior to the issuance of the letter of 25 May 2012 enclosing the CNC, KLIACS had notified the plaintiff through its letter dated 27 April 2012 that based on the plaintiff's current progress of works, KLIACS anticipates that a number of 'major outstanding works' would not be completed by 30 April 2012. The plaintiff was asked to respond within a week failing which a CNC will be issued and LAD will be imposed for the delayed works – see pp 203–204 of Bundle B2.

[58] The plaintiff responded by letter dated 2 May 2012 in which it, inter alia, advised KLIACS that 'it was the settled understanding between the parties that Section 1 works will be certified as substantially completed on 30.4.2012 and the incomplete minor works are to be regarded as outstanding works to be completed within 3 weeks by 21.5.2012' – see pp 205–206 of Bundle B2). PW1 testified that the 'plaintiff pointed out that the significance of the 30 April 2012 completion date for section 1 works was to ensure that the airport was able to operate on a 24 hour basis by 1 May 2012, which was achieved. The plaintiff also stated that the imposition of the LAD would be of profound gravity to the plaintiff as it would have to cease its construction activities'.

[59] PW1 testified that this understanding was first discussed at the March meetings (7 March 2012 and 12 March 2012) and DW1 and DW2 are said to be aware of this understanding from the meetings. Both have however, denied the existence of such understandings. What DW2 instead told the court was that it was, inter alia, discussed and agreed at the meeting of 7 March 2012, the terms of the SA, and that if the whole of the section 1 works were completed by 30 April 2012 (as required under the principal agreement), a conditional CPC will be issued and 50% of the bond would be released – see Q&A 6 of DW1's witness statement and minutes of meeting at pp 23–26 of Bundle C.

[60] On 23 May 2012, the plaintiff wrote to the Minister of Transport informing that the plaintiff had achieved substantial completion of section 1. In that same letter, the plaintiff requested for the issuance of CPC and the release of 50% of the performance bond – see pp 217–219 of Bundle B2. KLIACS was copied in on that letter to the Minister.

[61] Two days later, on 25 May 2012, KLIACS issued a CNC – see pp 226–229 of Bundle B2. A list of outstanding works as of 30 April 2012 was set out in Appendix 1 attached to the letter:

Date: 25 May 2012

Global Upline Sdn Bhd
17-5, The Boulevard, Mid Valley City
Lingkaran Syed Putra
59200 Kuala Lumpur
(Attn: YBhg Datuk Mohamad Danel Abong)

Dear Sir,

REDEVELOPMENT OF KOTA KINABALU INTERNATIONAL AIRPORT PACKAGE 2 – AIRSIDE INFRASTRUCTURE, AIR TRAFFIC CONTROL TOWER AND NEW LOW COST CARRIER TERMINAL CONTRACT NO.: KP/KEW/03/2006
Re-Issuance of Certificate of Non-Completion (CNC)

The above subject matter refers.

We regret to note that as of **30/4/2012** i.e. the **Date of Completion to Section 1** to the Supplementary Agreement that you had failed to complete works as Appendix 1 attach herewith.

In compliance to Clause 47 of the Conditions of Contract, the Employer herein, therefore, issue the Certificate of Non-Completion (Section 1) and he may without prejudice to any other method of recovery deduct LAD from any monies due to you. Nevertheless, such deduction shall not relieve you from you obligation and liabilities under the Contract.

We trust that you are suitably informed regarding the above matters.

Thank you.

Yours faithfully,
KLIA CONSULTANCY SERVICES SDN. BHD.

Ir. MOHD. HANAFFI AYOP
Project Director

cc Ketua Setiausaha
Kementerian Pengangkutan Malaysia
Aras 5, 6, 7, Blok D5
Pusat Pentadbiran Kerajaan Persekutuan
62502 Putrajaya
(U/P: YBhg Dato' Long See Wool)
(U/P: En Chua Kok Ching – SUB Kewangan)
(U/P: En M. Esparan – SUB Pembangunan)

APPENDIX A

Project : REDEVELOPMENT OF KOTA KINABALU INTERNATIONAL AIRPORT, SABAH
Package 2 : Airside Infrastructure, Air Traffic Control Tower and New Low Cost Carrier Terminal
Contract No : KP/KEW/03/2006
Subject : Outstanding Works Under Section 1 (Stage 3) – Contractual Completion Date of 30 April 2012 under Supplementary Agreement No. 1

Item	Description of Works (Achievement by 30 April 2012)	Description of Works (Works outstanding as of 30 April 2012)
1. a.	Runway Overlay (CH2930 to CH750, 2,080m length) 2nd layer of Runway Overlay: • Runway Shoulder:	2nd layer of Runway Overlay: • Runway Shoulder: RHS: bal 130 m (near Taxiway Bravo)

	RHS: 1,950 m, 94% completed 3rd layer of Runway Overlay: • Main Runway Section (45m width) 2,026m, 97% completed. • Runway Shoulder RHS: 88m 4.2% completed LHS: 843m 40% completed	3rd layer of runway Overlay: • Main Runway Section (45m width) balance of 54m at CH 750 – CH 804. • Runway Shoulder RHS: balance of 1992m LHS: balance of 1237 m
	Existing Taxiway Alpha Taxiway Alpha **not started** for rehabilitation works and M&E pipe crossing	Existing Taxiway Alpha - Pending Taxiway rehabilitation works & shoulder widening. - M&E pipe crossing for HT cable and AGL fibre optic cable.
	Overlay works at T1 Apron Taxiway (Bay 4 to Bay 6) **Not started** Overlay works at T2 Apron Taxiway **Not started** (To be carried out in parallel with Taxiway Alpha)	Overlay works at T1 Apron Taxiway (Bay 4 to Bay 6) Pending Overlay works at T2 Apron Taxiway **Pending**
	AGL Works for Stage 3 including PAPI RO2 and related T&C	
	Southern Parallel Taxiway, Kilo & Juliet and New Extended Runway - AGL light Fitting, Secondary and Primary cables installed. - CCR installed.	Southern Parallel Taxiway, Kilo & Juliet and New Extended Runway pending installation of RCMS (Remote Control Monitoring system) and fibre optic cable complete with T&C.
	Northern Charlie (up to CH900) - AGL light Fitting secondary and Primary cables installed.	Northern Charlie (up to CH900) - pending installation of RCMS and fibre optic cable complete with T&C - pending T&C of AGL works
	Taxiway Delta - Edge AGL light fitting, Secondary and Primary cables installed.	Taxiway Delta - pending installation of RCMS and fibre optic cable complete with T&C - pending T&C of AGL works - pending installation of centerline light fitting
	Existing Runway - Runway in operation using existing AGL fitting.	Existing Runway - Pending installation of new fittings - Pending Laying of secondary and primary cable - Pending Installation of RCMS and fibre optic cable complete with T&C - Pending T&C of AGL works
	Taxiway Echo - Edge Light fitting installed except	Taxiway Echo - Pending installation of centerline light

	centerline light. - Taxiway use during day time only since AGL Light **not ready.**	fittings - Pending Laying of secondary and primary cable - Pending installation of RCMS and fibre optic cable complete with T&C - Pending T&C of AGL works
	Taxiway Alpha - Not started.	Taxiway Alpha - Pending installation of edge and centerline light fittings - Pending Laying of secondary and primary cable - Pending installation of RCMS and fibre optic cable complete with T&C - Pending T&C of AGL works
	12 Nos. of Natural Obstruction Lights • **Not started**	12 Nos. of Natural Obstruction Lights • Confirmation of locations only done on 22 March 2012 • GU requested to postpone the completion date to 31 August 2012 due to late confirmation of site access • KLIACS has reviewed and requested consent from DCA as it relates to flight safety and requirement from Civil Aviation
	HT Reticulation Works for Section 1 Works HT works 80% completed for all section of works except for 2 remaining section.	HT Reticulation Works for Section 1 Works HT works outstanding for: PS 1 to CUB T2 CUB T2 to PS 2
	Drainage System & Pump Stations with Automatic Operation - Pump Station 2 completed - Pump Station 3 completed - Drainage system 99% completed	Drainage System & Pump Stations with Automatic Operation Pump Station 1 - Pending installation of genset - Sun-station renovation work yet to complete - Pending 200m of open drain near PS1 yet to be completed

[62] KLIACS also responded to the plaintiff's letter to the Minister. In its letter dated 28 May 2012, KLIACS essentially told the plaintiff that its application for CPC 'would not be considered' – see pp 231–232 of Bundle B2. According to KLIACS, this was because the plaintiff had 'failed to complete':

> Date : 28 May 2012
>
> Global Upline Sdn Bhd
>
> 17-5, The Boulevard, Mid Valley City
>
> Lingkaran Syed Putra
>
> 59200 Kuala Lumpur
>
> (Attn: YBhg Datuk Mohamad Danel Abong)
>
> Dear Sir,
>
> REDEVELOPMENT OF KOTA KINABALU INTERNATIONAL AIRPORT

PACKAGE 2 – AIRSIDE INFRASTRUCTURE, AIR TRAFFIC CONTROL TOWER

AND NEW LOW COST CARRIER TERMINAL CONTRACT NO.:

KP/KEW/03/2006

Re: Application for Certificate of Substantial Completion

Your letter to YB Minister of Transport Malaysia ref GU/KKIA/S/MO (14)/IL/4979 dated 23/5/2012 pertaining to the above subject matter refers.

You are to note that the Supplementary Agreement had clearly stipulated the works to be completed prior to the issuance of the Substantial Completion Certificate which to date you had failed to complete. The following works are still outstanding and you had promised that they were only be completed on 28/5/2012. Nevertheless, you had not complete till to date:

Apron Taxiway

AGL

In view of your failure to complete the works in Section 1 to the Supplementary Agreement, we regret to notify that your request for Certificate of Substantial Completion would not be considered.

We recommend for your own benefit that you use your best endeavours to speed up the works and complete the outstandings as soon as possible.

Thank you.

Yours faithfully,

KLIA CONSULTANCY SERVICES SDN. BHD.

Ir. MOHD. HANAFFI AYOP

Project Director

c.c. Ketua Setiausaha

Kementerian Pengangkutan Malaysia

Aras 5, 6, 7, Blok D5

Pusat Pentadbiran Kerajaan Persekutuan

62502 Putrajaya

(U/P: YBhg Dato' Long See Wool)

(U/P: En Chua Kok Ching – SUB Kewangan)

(U/P: En. M. Esparan – SUB Pembangunan)

(U/P: En. Samsuri Abdul Hamid – Bahagian Pembangunan)

[63] The plaintiff disagreed with KLIACS' letter on the CNC. In its letter dated 7 June 2012, PW2 prepared a table (Attachment 1) where he deals with each and every item raised in the CNC – see pp 236–238 of Bundle B2. In essence, the plaintiff:

(a) denies the defendant's allegations;

(b) questions the rationality of the issuance of the CNC;

(c) reiterates that the works have been duly completed;

(d) seeks revocation of the CNC;

(e) seeks issue of CPC on the basis of substantial completion and only minor works outstanding; and

(f) claims that such minor works remaining incomplete was agreed by the parties to be regarded as outstanding works.

[64] In order to determine the first issue of whether the plaintiff had achieved practical or substantial completion of section 1 works by 30 April 2012, the exact scope of the plaintiff's works; in particular section 1 works must first be defined. What exactly is that scope and what did the parties agree that the plaintiff had to complete by 30 April 2012. Once this issue is determined, the related issue of what the plaintiff had completed by that date qualifies as substantial or practical completion within the meaning of cl 48 of the principal agreement such as to entitle the plaintiff to CPC and the release of 50% of the performance bond, can then be properly addressed. The determination of that question will also deal with the matter of whether the CNC was validly issued; and the validity of termination by either party.

[65] The contract documents are to be found in five volumes:

Volume 1: Contract Particulars

Volume 2: Employer's Requirements

Volume 3: Technical Specifications (Parts 1 & 2)

Volume 4: Contractor's Proposal

Volume 5: Drawings

[66] There are three major components to the plaintiff's scope of works, namely the airside infrastructure, the air traffic control tower and the new low cost carrier terminal. The details of each of these components are to be found at pp 754–769 of Bundle A4. Specifically and in relation to airside, the plaintiff

is required to deal with 44 items; and nine items in relation to the new low cost carrier. As for the air traffic control tower, the plaintiff is required to provide a list of 11 new items and relocate four others. There are of course, provisions for other related matters such as ancillary buildings, roads, car parks and other services. In the execution of the works, the plaintiff is to comply with the technical specifications and the details as found in the drawings found in Vols 3 and 5 respectively.

[67] The plaintiff is also to abide by the defendant's requirements, central of which is the government needs statement; all of which are to be found in Vol 2 or Bundle A3. This needs statement is quite an important document as it provides for 'essentially end product specifications'. It 'defines the properties of the works including, where applicable, their size, shape, physical dimensions, the type and quality of the materials of which they are constructed, the functions they are required to perform satisfactorily and any special characteristics which they must have'. In short, it defines the contract.

[68] In relation to 'Airside', there are some 37 items detailed; for the new low cost carrier terminal, there are 13 items whereas in the case of the new control tower and DCA Administration Building, the plaintiff is required to, inter alia, 'provide an Air Traffic Control Tower with a Gross Floor Area of 700m[b2] and a Gross Floor Area of 750m[b2] for the DCA Building'. There are also extensive detailed 'Particular Requirements of the Works' spelt out at para 3 on matters such as site clearing and earthworks; reclamation; runway, taxiways and parking apron; airport drainage system; security fencing; buildings; Access Road, Service Road, Perimeter Road and Car Park; Aeronautical Ground Lighting (AGL); Navigational Aids; Water Supply, Storage and Distribution; Electrical Installation; Telecommunication Services; Mechanical Installation;' to name a few.

[69] It is not in dispute that there was this EPD problem which was serious enough to cause the parties to sit down, discuss, negotiate and propose ways to deal with the problem. This EPD problem had to be surmounted otherwise there would be no new Runway 02 to talk about since a portion of it extends offshore with its related navigational and landing lights. Suitable construction methods had to be proposed to deal with both EPD and the public's concerns. It is further not in dispute that the discussions and negotiations led the parties not in the direction of applications for time extensions. Instead, the parties decided to enter into a supplementary agreement, the SA.

[70] Preamble B of the SA expressly acknowledges that the plaintiff had notified the defendant of its:

> proposed alternative method of construction by using Temporary Staging to mobilize piling frame as per the Environmental Protection Department ('EPD') of

> Sabah's approval letter ... dated 31 January 2011 (as shown in Schedule A) is necessary for the Execution of the Works with respect to The Precision Approach Light at Runway 02. This is in order to comply with the Supplementary Environmental Impact Assessment (EIA) Study in the EPD of Sabah's letter ... dated 9 June 2010 that requires for a more environmentally friendly method to protect the shoreline. Subsequently, the Government with the approval of the Ministry of Finance via letter dated 30 January 2012 agreed to proceed with the modifications of construction method for the Offshore Precision Approach Lights at Runway 02'. With this acknowledgment, the parties 'are now desirous of amending the provisions of the Principal Agreement subject to the terms and conditions in this Supplementary Agreement'.

[71] Under the SA, the defendant agreed to pay the plaintiff a supplementary agreement sum of RM11,762,662 'limited only to the modification of construction method to the alternative method which is Temporary Staging in compliance with EPD's approval with regards to the Contractor's Supplementary EIA Study'. By cl 1 of the SA, the parties expressly agreed that the SA:

> ... is to be supplemental to and shall be read and construed as part of the Principal Agreement'. Unless specifically defined or if the context requires the words and expressions used in the Principal Agreement 'shall have the same meaning when used herein.

[72] Clause 2.3 of the SA provides that:

> In the event of any conflict or inconsistency between the provisions of the Principal Agreement and this Supplementary Agreement, the provisions of this Supplementary Agreement shall prevail.

[73] Clauses 6 and 7 respectively amended cl 43A of the principal agreement and substituted the old Appendix 11 with Appendix 11A. Appendix 11A comprised Schedule B which is 'further demonstrated by Schedule C'. Schedule B divided up the works into three sections with different completion dates and different rates of LAD imposed in the event of non-completion by the completion dates fixed:

	Description of Works	Deadline	LAD
Section 1	The whole of the works (excluding the section 2 works and section 3 works described): [95] extended runway, southern parallel taxiway and reconstruction of Runway 02 (CH2830 to CH2988)	30 April 2012	0.015% of the contract price per day

	[95] existing taxiway alpha, foxtrot and juliet [95] new taxiway delta, echo and northern parallel taxiway (CH1850 to CH900) [95] three layer of runway overlay work (CH2830 to CH750) [95] overlay works at T1 and T2 apron taxiways [95] AGL works for stage 3 including PAPI R02 and related T&C [95] 12 Nos of natural obstruction lights [95] M&E works for stage 3 (HT reticulation) [95] drainage system and pump stations with automatic operation [95] all security fencing, gates and turfing		
Section 2	Runway 20 with and including precision approach light portion: [95] reconstruction of existing Runway 20 (raised 2m)(CH350 to CH 0) [95] reconstruction of existing taxiway mike and portion of charlie (CH2775 to CH3100) [95] northern parallel taxiway (CH900 to CH175) [95] new taxiway November [95] rehabilitation of existing taxiway bravo [95] precision approach light Runway 20 [95] AGL works for stage 4 including PAPI R20 and related T&C [95] ILS System and GP for R02 and R20 and related T&C [95] AWOS system	31 August 2012	0.015% of the SA sum per day

Section 3	precision approach light for Runway 02 at the offshore portion [95] offshore approach lights R02 (480m) with related T&C	31 December 2012	0.015% of the SA sum per day

[74] Schedule C contains three drawings, one for each section. In the drawing for 'A Part of Section 1 Works (Completion of stage 3 works and extended Runway 02 with simple approach light – interim only)', the details of what was required are also set out:

> SECTION 1 WORK (WORK UNDER STAGE 3 – TO COMPLETE BY 30 APRIL 2012)
>
> [95] Extended Runway, Southern Parallel Taxiway & Reconstruction of Runway 02 (CH2830 to CH2988)
>
> [95] Existing Taxiway Alpha, Foxtrot & Juliet
>
> [95] New Taxiway Delta, Echo & Northern Parallel Taxiway (CH1850 to CH900)
>
> [95] 3 layer of Runway Overlay Work (CH2830 to CH750)
>
> [95] Overlay works at T1 and T2 Apron Taxiways
>
> [95] AGL Works for Stage 3 including PAPI R02 and related T&C
>
> [95] 12 Nos. of Natural Obstruction Lights
>
> [95] M&E Works for Stage 3 (HT Reticulation)
>
> [95] Drainage System & Pump Stations with Automatic Operation
>
> [95] All Security Fencing, Gates and Turfing

[75] Under the terms and conditions of the SA, the plaintiff is obliged to complete 'The whole of the Works (excluding the Section 2 Works and Section 3 Works described)' by 30 April 2012. The term 'Section 1 Works' is not defined, be it in the SA or the principal agreement. However, the following terms as found in the principal agreement are:

> 'Works' means all the Permanent Works and Temporary Works related to airside and landside, all as more fully described in the Employer's Requirements, intended to form part of the Permanent Works
>
> 'Permanent Works' means the permanent works to be Designed and Executed (including the Civil Works and System Works and Other Works) in accordance with the Contract
>
> 'Temporary Works' means all temporary works of every kind (other than the Contractor's Plant) required in or about the design and Execution of the Works

'Building and Civil Works' means the building, civil and structural works including any demolition, extension, removal and refurbishment or upgrading works together with ancillary works required to connect utilities, services and the like, all as more fully described in the Employer's Requirements. The Building and Civil Works form part of the Permanent Works

'System' means the system to be provided for the functioning of the whole airport operation which is more fully described in the Employer's Requirements

'Other Works' means all works other than Civil Works, and System Works, deemed to be necessary for the completion of the Project, intended to form part of the Permanent Works

'Project' means the design, construction, completion and maintenance of the Redevelopment of Kota Kinabalu International Airport, Sabah.

[76] Although none of the above terms define 'Section 1 Works', the meaning accorded to these other terms will assist in understanding what 'Section 1 Works' mean. PW1 described section 1 works 'as the whole of the works excluding Section 2 works and Section 3 works'. He listed out the works that he understood as falling within section 1. His description is in fact confirmed by Mohd Fadhil bin Ramli ('DW3'), the defendant's project manager. DW3 testified that the works that the plaintiff had to complete under section 1 can be found at Schedule C of the SA. The items set out in Schedule C are the same as those listed by PW1; and it is as set out in the table above.

[77] It is further noted that the works mentioned in the SA are in sections. PW2 explained that the division of the works into three sections was 'because of the sequence of works and the fact that the Defendant wanted to maintain the extended completion date of 30.4.2012 under the Contract'. Certain works such as the AGL and M&E Works are described by reference to a particular 'Stage'; for example 'AGL Works for Stage 3'. This reference to works in terms of stages is set out in the method statement for AGL stages for airside transition plan found at pp 15–22 of Bundle A2. This method statement defined the scope of works and installation method of the temporary AGL works in the various stages of airside transition plan. There are effectively three stages in the plan. At the time of the SA, these works were at stages 3 and 4. By this time of the SA, it is also apparent that the works as detailed in Schedule C were the only works remaining or outstanding under the principal agreement and the SA.

[78] Therefore, the term 'Section 1 Works' must be read to refer to all or the whole works under the principal agreement. the term cannot be confined to the works specified in Schedule C in the SA. A further reason for saying so, as we shall soon see is because the issuance of CPC is not tied up with the completion of all three sections of works but only with section 1 works. This point was made by PW1 in his evidence in chief in that ordinarily, CPC will not arise

until the last of the Works have been completed; in this case, it would have been section 3. Although PW1 relates this in the context of what he claims to be a holding-out agreement, this understanding bears upon the construction of the SA and the determination of the first issue.

[79] This understanding can also be gathered from the arguments of the defendant, in particular. As far as the defendant is concerned, it accepts that CPC can be issued for the whole Works under the project if the plaintiff can show that it has completed the whole of section 1 works. The state of section 2 and section 3 works, whether they have been completed or even commenced, is irrelevant or immaterial to the issuance of CPC. The defendant's case is not that CPC cannot be issued or cannot arise unless and until section 3 works have been completed. From the defendant's perspective and this is in its defence, the plaintiff 'should have completed the whole of Section 1 before it can be said to fulfil the Substantial Completion Date as provided in Clause 43 of the said Contract'. This position of the defendant is not only reflected in the defence filed (see for example paras 25, 30 and 31) but in the evidence of DW2 and DW3; and the submissions of learned senior federal counsel.

[80] This position in the defendant's case has important bearings and implications. As mentioned earlier, the CPC under consideration is first and foremost, one which is issued in relation to the whole works under the project and not just for a portion of the works. The parties were not contemplating the issuance of a sectional CPC although there is provision for such a CPC to be issued.

[81] Furthermore, from the oral and documentary evidence adduced, as well as from the further submissions of both parties, it is clear that the parties intended a full conditional CPC to be issued when the whole of section 1 works, that is, 'The whole of the Works (excluding Section 2 Works and Section 3 Works described hereunder)', is completed; even if section 2 and 3 have not even been completed or even started. This must include the five areas of Works which had been earlier handed over to the defendant. Those five areas must necessarily fall to be considered in the issue of whether 'The Whole of the Works (excluding Section 2 Works and Section 3 Works described hereunder)' has been completed. To do otherwise will be to leave those five areas without any CPC; which surely cannot be the case.

[82] Since the five taking-over certificates ('TOC') for the relevant works were issued without incident (regardless of the list of outstanding works as there is no issue on the list), it must be taken that those related Works have been more than practically completed or satisfactorily completed – see pp 9–31 of Bundle E. In any case, the TOCs clearly state that they are in relation to 'Substantial Completion: The Whole/Parts of the Works'.

[83] Further and as already alluded to earlier, section 2 and section 3 works must be understood and treated as 'Outstanding Works' or 'minor works'. The defendant was prepared to issue the cpc for the whole of the works under the project regardless the position with sections 2 and 3 works. This position, so confidently accepted by the defendant must necessarily mean that section 1 works are paramount and the works represents effectively the whole of the works under the project leaving the works in section 2 and section 3 as minor works. Being minor works, the section 2 and section 3 works do not impact on the issue of CPC.

[84] In other words, CPC may be issued even if these works were not completed or have not even been commenced. I cannot imagine how a full conditional CPC could otherwise be agreed to be issued for such an important facility as an airport. KKIA is an international airport where public safety amongst others, would be paramount and uppermost in the concerns of the defendant when deciding whether or not CPC could or could not be issued. The issuance of a CPC has many implications, amongst which is that the airport is now ready to be used or occupied.

[85] Therefore, it may be reasonably deduced that implicit in the defendant's own argument that CPC can be issued if the plaintiff can show completion of 'the whole of Section 1 before it can be said to fulfil the Substantial Completion Date as provided in Clause 43 of the said Contract' is this – save for the works in section 2 and section 3 which are to be completed at later dates, all of the works under the project especially those set out in Schedule C must be completed by 30 April 2012.

[86] Put another way, learned senior federal counsel confirmed that the defendant is prepared to release 50% of the performance bond if the plaintiff can show its entitlement to the CPC. This is also seen in the evidence of DW2 and DW3. Learned SFC submits that the plaintiff is however not entitled to the CPC or to the release of half of the performance bond because it has not completed the section 1 works by the due date.

[87] I am actually fortified in my findings when one has regard to this date of 30 April 2012 for completion of section 1 works. this date is actually the date of completion under the principal agreement. Under the SA, this date is now only relevant for section 1 works. Given that section 2 and section 3 works contain only minor works, and section 1 encompasses the whole of the works, this effectively means that the whole of the works under the project or under both the principal agreement and the SA must be completed by 30 April 2012.

[88] So, aside from the works which had already been completed earlier and handed back to the defendant through the five handover certificates, what must

the plaintiff complete by 30 April 2012? These would be the ten items identified in Schedule C. Save for certain items such as the three layer requirement of runway overlay work at CH2830 to CH750; and the provision of 12 natural observation lights, there is generally no particular description or further specifications as to the extent of completion of each of these ten items. Since cl 2 of the SA provides that the words and expressions defined in the principal agreement 'shall have the same meaning when used herein', one needs to turn to the Principal Agreement' for their meaning.

[89] The plaintiff bears the burden of proving that it has achieved substantial or practical completion within the meaning of cl 43 to warrant the issuance of the CPC under cl 48.2.

[90] Having examined the oral and documentary evidence. I am satisfied that the plaintiff has discharged this burden on a balance of probabilities. The plaintiff has proved that it has substantially completed the works expected of the plaintiff by the due date of completion, that is, 30 April 2012. What the plaintiff has left outstanding, and there are some, the Court is satisfied that such works do not affect the finding that the required Works have been substantially completed. Such works are either minor and/or are not due as they form or are related to section 2 and section 3 works.

[91] First, the plaintiff has offered satisfactory evidence on the level of completion as at 30 April 2012. As at 30 April 2012, the plaintiff claims that it had achieved completion of 98.81% of section 1 works and 94.17% of the whole of the works. In support of its claim, the plaintiff through PW1 and PW2 referred to the records of the weekly and monthly meetings where these levels of completion were discussed – see for instance p 11 of Bundle D and pp 51–56 of Bundle C. By 21 May 2012, 99.36% of section 1 works had been completed. PW2 claims that he had emailed one Lau Ooi Ling, the Deputy Project Director of KLIACS and reported the same.

[92] PW2 was the person who had calculated the percentage of completion as mentioned above. He produced a copy of the sectional physical progress as at 30 April 2012 showing an achievement of 98.81% – see exh P1. This summary of sectional physical progress was later updated for 21 May 2012 and forwarded to Lau in PW2's email to Lau. The updated summary for 21 May 2012 can be seen at pp 220–225 of Bundle B2. PW2 testified on how he had arrived at 98.81% and later 99.36%. He explained that the 'format was computed based on the overall physical works progress that was reported to KLIACS in Progress Weekly Reports and Progress Monthly Reports. In deriving the percentage of sectional progress for Section 1, works items under overall physical works were re-apportioned to reflect actual works that fall within Section 1, Section 2 and Section 3 of the SA'.

[93] Insofar as the percentage of completion is concerned, the defendant contends through DW3 that 93.85% was 'based on the Overall Work Program Review No 4 as of 23 April 2012 as compared to the work as scheduled which was supposed to be 99.83%'. DW3 further testified that 'based on the actual progress of work ... the plaintiff was in delay about 6.08% which involved a delay of 204 days ...'. At para 24 of the defence and as testified by DW3, as of April 2012, the plaintiff was only able to complete 94.17% from the whole of the said work. By 28 June 2012, this value had only reached 98.80%. The defendant submits that all this shows that the plaintiff had failed to complete as required.

[94] I disagree with the defendant's contentions. Dealing first with the level of completion and the way it was calculated. PW2 was not seriously cross-examined on how his methodology; the correctness or otherwise of his calculations. In fact, it may be said that the defendant actually accepts these levels of achievement but disagree that these levels represent the levels required under the terms of the SA read with the principal agreement. According to the defendant, the plaintiff ought to have achieved some other levels at the material time. This can be inferred from the defence, the agreed facts and the evidence of DW3. At para 23 of the defence, the defendant has actually admitted that its representative, KLIACS had 'acknowledged at a monthly progress meeting that the plaintiff had completed 93.85% of the whole of the Works'.

[95] As for the format used by PW2 to calculate the level of completion of the relevant works, the court finds that the format adopted by the plaintiff is one which is reasonable and fair in view of the construction that the court has given to what is meant by section 1 works and the whole of the works. The works already completed cannot be ignored and when one examines exhibit P1, it can be seen that PW2 has provided for building works, civil works, overall M&E works and ancillary items. PW2 has recognised the items that fall within section 1 for all these works and he has given the appropriate weightage to the work done. He is an experienced registered quantity surveyor, the relevant and qualified person to have prepared the summary of sectional physical progress. He is the best person to calculate the relevant level of Works completed.

[96] PW2 has also clarified on the discrepancy between the 'Scheduled Progress' of 99.93% and the plaintiff's achievement of 93.85%. According to PW2, the scheduled progress was 'based on the approved Overall Works Programme Revision 4 which was premised on the whole of the Works being completed by the original extended completion date of 30.4.2012. OWP Revision 4 does not take into account the sectional completion of works under the SA and the extended timelines for the sectional completion'.

[97] I have not been shown any evidence to find or suggest that either PW2 is not qualified to testify on the matters that he had given evidence; or that he is erroneous in his calculations whether in methodology, the details or the calculations done; or that he is wrong in his explanation on the OWR Rev 4. On the contrary, I find PW2 quite competent and familiar with the works having left the employ of KLIACS and presently is employed by the plaintiff as its contracts manager. He was also a quantity surveyor while at KLIACS. His testimony was clear, credible and confident. I have not found any part of his evidence contradicted, challenged or eroded, certainly not in any material respect. Since the SA was brought about by reason which the defendant itself accepts and which has led to the division of the Works into three separate sections with different dates for completion, PW2's explanation of the OWR Rev. 4 makes sense. The court therefore accepts that the plaintiff has indeed achieved the levels of completion that it claims.

[98] On the question of whether KLIACS' letter of 25 May 2012 and thereby the defendant was correct in saying that the plaintiff had works which were yet to be completed, PW2 testified on his detailed response that was sent to the defendant on 7 June 2012.

[99] In summary, PW2 was of the view that the mere fact that there is a list of outstanding works does not necessarily mean that the plaintiff has not achieved substantial completion. PW2 referred to the earlier TOC items where the defendant itself had certified that the relevant works were substantially completed although accompanying the TOC was an 'extensive 7-page list of outstanding works'. PW2 categorically testified that 'according to my calculations, 98.81% of Section 1 works was completed as at 30.4.2012 ... Apart from my calculations, it is very clear based on the plaintiff's comments in Attachment 1 of its letter dated 7.6.2012 that the plaintiff achieved substantial completion of Section 1 work as at 30.4.2012'.

[100] PW2 further testified that 'the figure of 98.81% alone is compelling to show that the works were substantially completed.' Given that the plaintiff has indeed achieved the levels of completion that have been calculated by PW2 and relied on by PW1 in his testimony, and, these percentages are not seriously challenged, does that ipso facto mean that the levels achieved meet the contractually agreed terms?

[101] In my judgment, that is a question of construction of the terms in the principal agreement, the SA, and the related contractual documents which comprises the contract. Here, the parties have provided for matters relating to completion in cl 43 and for the issuance of CPC under cl 48.2 of the principal agreement:

43. DATE FOR SUBSTANTIAL COMPLETION

(a) The whole of the Works shall be Substantially Completed by the Date for Substantial Completion.

(b) The Contractor shall achieve each of the Priority Events on or before the Priority Date relating thereto.

(c) The Contractor shall use his best endeavours to achieve each of the Key Events on or before the Key Date relating thereto.

48. COMPLETION OF THE WORKS48.1 DATE OF COMPLETION

Subject to any requirements as to the completion of any section or part of the Works under Clauses 38.3 and 42 before the completion of the whole of the Works, the Contractor shall complete the whole of the Works on or before the 'Date for Completion' stated in Appendix 1 or such extended time as may be allowed under Clause 44 hereof.

48.2 CERTIFICATE OF PRACTICAL COMPLETION

When the whole of the Works have reached practical completion according to the provisions of this Contract and to the satisfaction of the P.D., the date of such completion shall be certified by him and such date shall be the date of the commencement of the Defects Liability Period as provided in clause 47 hereof. The certificate issued under this sub-clause shall be referred to as the 'Certificate of Practical Completion'.

[102] There is provision for sectional completion in cl 43A but this is not relevant in the facts of this case.

[103] From my reading of cll 43 and 48, it is clear that the plaintiff is not required to achieve full or 100% completion. The parties have agreed that all that is required for completion within the intent and purpose of the agreement is 'substantial completion'. Where there is substantial completion, CPC may be issued. This is evident from cl 43(a) of the principal agreement which clearly obliges the plaintiff to achieve substantial completion of the whole of the works by the date of completion. Again, there is no definition of the term 'substantial completion' but what it means may be gathered from several other related definitions.

[104] In cl 1.1 of the principal agreement, the term 'Practical Completion' is defined as having 'the meaning ascribed to it in Clause 48.2, as limited by Clause 48.7'; and 'Substantially Complete' and 'Substantially Completed' shall be construed accordingly'. Clause 48.7 does not apply here as it deals with 'Consequences of Failure to Pass Commissioning Tests.' What is relevant is cl 48.2 which has been set out above. From this, it would appear that the term 'substantial completion' and 'practical completion' are not only inter-related but are inter-changeable terms; and they mean or refer to the same.

[105] Clause 48.2 provides that when the whole of the works have reached practical completion according to the provisions of this contract and to the satisfaction of the PD, then CPC may be issued. The defects liability period or DLP starts from the date of the CPC. Clause 48.2 defines the state of completion which has to be reached in order that CPC may be issued; and that is when the works have reached or achieved 'practical completion according to the provisions of this Contact and to the satisfaction of the PD'.

[106] The defendant has made one argument which I wish to deal with immediately. The defendant contended that it is up to the PD under cl 48.2 to determine whether the plaintiff has reached or achieved the state of practical completion. Since there is no evidence of the PD being 'satisfied'; the defendant argues that the plaintiff is not entitled to CPC.

[107] With respect, the court disagrees. The evidence is clear that the plaintiff sought for the issuance of CPC and it was refused. It was refused not because the plaintiff did not follow procedure by applying to KLIACS or to the PD. This is evident from KLIACS' letter of 28 May 2012. The letter clearly states that the CPC will not be considered because the plaintiff had not achieved completion of section 1 works as required. The defendant cannot now canvass a different argument which is not supported by the facts and which was never in issue between the parties at the material time.

[108] Coming back to the central issue of completion; it is evident from both the terms of the principal agreement and the defendant's conduct that the parties themselves do not require total or full completion before CPC may be issued. There is no need for literally the whole of the works to be completed. All that is required is a substantial or practical completion of section 1 works.

[109] The test of completion is of substantiality or practicality; and although the percentage of completion is helpful, it is by no means conclusive. It is however, a good start. Whether practical or substantial completion has been achieved in any given set of facts depends on the true construction of the principal agreement and the SA. From the submissions of both learned counsel, I find that both are in accord as to the law on completion of contracts. The defendant has referred to generally the same cases as the plaintiff.

[110] In the oft-cited decision of *Hoenig v Isaacs* [1952] 2 All ER 176, the English Court of Appeal discussed the same question couched in these terms:

> This case raises the familiar question: Was entire performance a condition precedent to payment? That depends on the true construction of the contract.

[111] In that same decision, Romer LJ opined the following:

> In certain cases it is right that the rigid rule for which the defendant contends should be applied, for example, if a man tells a contractor to build a ten foot wall for him in his garden and agrees to pay [a3]x for it, it would not be right that he should be held liable for any part of the contract price if the contactor builds the wall to two feet and then renounces further performance of the contract, or builds the wall of a totally different material from that which was ordered, or builds it at the wrong end of the garden. The work contracted for has not been done and the corresponding obligation to pay consequently never arises. But when a man fully performs his contract in the sense that he supplies all that he agreed to supply but what he supplies is subject to defects of so minor a character that he can be said to have substantially performed his promise, it is, in my judgment, far more equitable to apply the *H Dakin & Co Ltd v Lee principle* than to deprive him wholly of his contractual rights and relegate him to such remedy (if any) as he may have on a quantum meruit, nor, in my judgment, are we compelled to a contrary view (having regard to the nature and terms of the agreement and the official referee's finding) by any of the cases in the books…The general principle is clearly stated in FRY ON SPECIFIC PERFORMANCE … as follows:
>
> > The description by which a thing is contracted to be sold is a matter for which the vendor is prima facie responsible. In as much, however, as equity looks to substance rather than to the mere letter of a contract, if the vendor shows that he can substantially do what he contracted to do, he is entitled to enforce specific performance, although he may be unable to do it *modo et forma* according to the letter of the contract; the difference between what he contracted to do and what he can actually do becoming the subject to compensation.

[112] In *Bolton v Mahadeva* [1972] 1 WLR 1009, Lord Justice Cairns of the Court of Appeal said:

> In considering whether there was substantial performance I am of the pinion that it is relevant to taken into account both the nature of the defects and the proportion between the cost of rectifying them and the contract price. It would be wrong to say that the contractor is only entitled to payment if the defects are so trifling as to be covered by the de minimis rule.

[113] While this case and the other few cases examined here concern the matter of defects as opposed to outstanding or uncompleted works, I must say that the approach and the tests applied are still relevant and applicable to the present facts. It is a matter of degree and not exactness.

[114] The question to be asked then is whether the plaintiff's performance or completion of section 1 works so different from that which it had contracted or promised to perform or complete. If the answer is in the negative; then the works must be said to have been substantially or practically completed. Where the answer is in the affirmative, but it is found that that which the plaintiff has not performed or completed is so minor a character such that the use of the

completed works is not impeded or impeded in any material respect; then, the plaintiff must nevertheless be found to have substantially or practically completed the section 1 works.

[115] This view finds support too, from the distinguished authors of *Hudson's Building and Engineering Contracts* (para 6-007 at p 862, 12th Ed), dealing with the issue of the nature of completion required to determine whether there is completion in any given set of facts:

> The degree of required completion needed to discharge the Contractor's obligation to complete to time will be a matter of interpretation, but can be expected to differ from other aspects of the Contractor's obligation to complete. In English standard forms of contract employing liquidated damages clauses for delay, this is often expressly described as 'practical' or 'substantial' completion, but there is no reason to suppose that these expressions mean anything very different from the word 'completion' simpliciter when used or implied in the context of completion to time. It is submitted that this is will, in the absence of contrary indication, mean when the work reaches a state of readiness for use or occupation by the Employer and free from any known omissions or defects which are not merely trivial.

[116] The author's view as above was approved and applied in the case of *Mariner International Hotels Ltd & Anor v Atlas Ltd & Anor* [2007] HKCU 209 where the Hong Kong Court of Final Appeal agreed that:

> as used in building contracts 'practical completion' is a legal terms of art well understood to mean a state of affairs in which the works have been completed free from patent defects other than ones to be ignored as trifling.

[117] The authors of *Hudson's Building and Engineering Contracts* suggest that by taking this approach, the Hong Kong Court of Final Appeal has in fact 'also approved Viscount Dilhorne in *Westminster Corporation v J Jarvis & Sons Ltd* [1970] 1 WLR 637 at p 646; Lord Diplock in *P & M Kaye Ltd v Hosier & Dickinson Ltd* [1972] 1 WLR 146 at p 165; and a couple of other cases on the meaning of 'practical completion'. In *Westminster Corporation v J Jarvis & Sons Ltd*, Viscount Dilhorne had said:

> The contract does not define what is meant by 'practically completed'. One would normally say that a task was practically completed when it was almost but not entirely finished, but 'practically completed' suggests that that is not the intended meaning and that what is meant is the completion of all the construction work that has to be done.

[118] His Lordship then observed that the defects liability period ('DLP') in the contract runs from the date in the practical completion certificate. During this period, the contractor is required to make good any defects, shrinkages or other faults which may appear during the DLP. Once the DLP is over and the defects have been made good, the architect in that case was obliged to issue a

final certificate which is conclusive evidence that the works have been properly carried out and completed in accordance with the terms of the contract. The existence of these provisions led His Lordship to draw the following conclusions which were later picked up in the decision of *Emson Eastern Ltd (in receivership) v EME Developments Ltd* 26 ConLR 57:

> ... first, that the issue of the certificate of practical completion determines the date of completion, which may, of course, be before or after the date specified for that in the contract, and secondly, that the defects liability period is provided in order to enable defects not apparent at the date of practical completion to be remedies. If they had been then apparent, no such certificate would have been issued.
>
> It follows that a practical completion certificate can be issued when owing to latent defects, the works do not fulfil the contract requirements and that under the contract works can be completed despite the presence of such defects, completion under the contract is not postponed until defects which became apparent only after the work had been finished have been remedied.

[119] In *Emson Eastern Ltd (in receivership) v EME Developments Ltd* 26 ConLR 57, Judge Newey discussed the approach of both the Court of Appeal and the House of Lords in *Westminster Corporation v J Jarvis & Sons Ltd*, finding that 'The standard which the architect must apply in deciding when practical completion of the Works has been achieved was differently stated by Salmon LJ and by Lord Dilhorne in the *Jarvis* case, the latter being more stringent that the former':

> *Westminster Corp v Jarvis & Sons Co Ltd* [1969] 3 All ER 1025, CA; rvsd [1970] 1 All ER 943, HL was a case which among other things involved consideration of cll 15 and 21 of a JCT 63 contract, the first of which required the contractor to 'complete the Works on or before the date fixed for completion in the appendix' and the second required the architect to issue a certificate of practical completion. Salmon LJ said ([1969] 3 All ER 1025 at 1031):
>
> > The obligation on the contractors under cl 21 to complete the works by the date fixed for completion must, in my view, be an obligation to complete the works in the sense in which the words 'practically completed' and 'practical completion' are used in c 15 and cl 16 of the contract. I take these words to mean completion for all practical purposes, i.e., for the purpose of allowing the council to take possession of the works and use them as intended. If completion in cl 21 meant completion down to the last detail, however trivial and unimportant, then cl 22 would be a penalty clause and as such unenforceable.

In the House of Lords Lord Dilhorne said ([1970] 1 All ER 943 at pp 948–949):

> The main contract not only states the date for completion of the contract works. It also provides by condition 15(1) that when in the opinion of the architect the works are practically completed, he shall issue a certificate to that effect and 'Practical Completion of the Works shall be deemed for all the purposes of this Contract to have taken place on the day named in' the certificate. The contract

A does not define what is meant by 'practically completed'. One would normally say that a task was practically completed when it was almost but not entirely finished; but 'Practical Completion' suggests that that is not the intended meaning and that what is meant is the completion of all the construction work that has to be done. This interpretation is supported by the fact that the defects liability period runs from the date in the practical completion certificate ... From these provisions there are, in my opinion, two conclusions to be drawn: ...

[120] Judge Newey then discussed a third case, decided by him and this is what he said:

C The third case is *H W Neville (Sunblest) Ltd v William Press & Son Ltd* (1981) 20 BLR 78, in which I had to consider the same clauses as those involved in the Jarvis case and I said (at 87):

D In my judgment, since Clause 21(1), and the appendix requires William Press to complete the works by 18th February, 1974 or within such extension of time as was granted by the architect, that was the date by which they had to be completed. I think that the word 'practically' in Clause 15(1), gave the architect a discretion to certify that William Press had fulfilled its obligation under Clause 21(1), where very minor de minimis work had not been carried out, but that if E there were any patent defects in what William Press had done the architect could not have given a certificate of practical completion.

[121] According to Judge Newey:

F In the *William Press* case I seem to have sought a position in between and I think that that is probably right.

[122] More significantly are the conclusions drawn which I find both useful and practical:

G Conclusions

The JCT contract is a standard form of contract very widely used in the construction industry in this country and abroad. Its wording has been agreed unanimously by a committee consisting of representatives of all sections of the H industry. I think that the matrix of facts against which it should be construed is what happens on building sites generally, rather than those which prevailed when the plaintiffs and defendants entered into their contract. In any event, however, the present case would seem to be a typical one.

I *Probably the most important background fact which I should keep in mind is that building construction is not like the manufacture of goods in a factory. The size of the project, site conditions, use of many materials and employment of various types of operatives make it virtually impossible to achieve the same degree of perfection as can a manufacturer. It must be a rare new building in which every screw and every brush of paint is absolutely correct.*

> ... The effect of practical completion is to start the defects liability period running for the period stated in the appendix or, if none stated, for six months from practical completion. During that period the contractor would not be carrying out works, but it could be required to remedy any defects in them. The employer can then go into occupation of the building without having to make arrangements under cl 18.
>
> I have described what I think to be the overall scheme of the contract. In my opinion there is no room for 'completion' as distinct from 'practical completion'. Because a building can seldom if ever be built precisely as required by drawings and specification, the contract realistically refers to 'practical completion', and not 'completion' but they mean the same. If, contrary to my view, completion is something which occurs only after all defects, shrinkages and other faults have been remedied in accordance with cll 17.2 and 17.3 and a certificate to that effect has been given under cl 17.4, it would make the liquidated damages provision in cl 24 unworkable and in practice would require the defects liability period to be added to the time initially negotiated by the parties for the carrying out of the works. The construction industry recognizes a difference between the carrying out of new works and 'snagging', that is to say dealing with minor defects in them. (Emphasis added.)

[123] In this case, the defendant's issue is not of defective works but incomplete works. The defendant claims that the plaintiff still has a list of outstanding works which it had promised to complete by 30 April 2012.

[124] Here, I find the evidence of PW2 relevant. According to PW2, only AGL works (stage 3) under section 1 works are to be completed. PW2 explained that AGL (aeronautical ground lighting):

> ... covers any light specifically provided as an aid to air navigation, other that a light displayed on an aircraft. So approach lights, runway lights, stopway lighting, taxiway lighting, obstacle lights and stop bars are some examples of aeronautical ground lights. The Defendant wanted the AGL component to be remote controlled. The plaintiff has explained to the KLIACS that installation of the RCMS requires integration of the whole of the AGL works under Stage 3 of the AGL Transition Plan at pp 15–22 of B1 (which comes under Section 1), Stage 4 (which comes under Section 2) and the offshore PAL (which comes under Stage 3). The testing and commissioning of the RCMS has to be done on a total system and because of that it can only be carried out at the end of the whole AGL works, including the Offshore PAL. This means that the testing and commissioning can only be done after completion of Section 3 works on 31.12.2012. This is not rocket science. It's logical in terms of sequence of works. The AGL under Section 1 works was operated by manual control which was acceptable to both DCA and MASB. As such, the RCMS should not be included in the list of outstanding works under Section 1 as the Defendant has done.

[125] PW2 referred to the minutes of the Monthly Progress Meeting found at pp 43–50 of Bundle C, its letter to KLIACS dated 4 May 2009 found at pp 18

of Bundle B1, and para 3.9.5 of the government needs statement (p 452 of Bundle A3) in support. I have examined these documents and I find no reason to reject PW2's explanation.

[126] As for the apron taxiway, PW2 had also explained in attachment 1 that overlay works had achieved 70% completion on T1 as at 28 May 2012 and; completed in relation to T2 by 15 May 2012 'except at intersection Taxiway 'B' which is to be executed under Section 2 Works'.

[127] The court finds PW2's explanations as to the detail progress of works, and in particular that the percentages achieved by the plaintiff represent substantial completion, satisfactory. In fact, this can also be inferred from the defendant's own conduct. Although the defendant's first letter of 25 May 2012 had a list of outstanding matters, the defendant had narrowed the list down to two items by its letter of 28 May 2012, sent just three days later. The position of the two items is as discussed above.

[128] Once again, the court has not been shown any contrary evidence and there was no suggestion from the defendant that the plaintiff is erroneous in its conclusions or contentions. None of the witnesses called by the defendant could explain in any clear or confident terms or to any degree what any of the plaintiff's witnesses have said is wrong; or misleading; that the levels of completion are wrong or of no significance; that the use or occupation of the airport was affected come 1 May 2012. What the court was shown instead and quite adequately I must say and on a balance of probabilities is that the relevant levels of completion of the works to KKIA were at the levels as testified by the plaintiff.

[129] Therefore, the court finds and accepts the plaintiff's claim that the list of outstanding works in both of the defendant's letters are not conclusive of the status of the plaintiff's work; that in fact the plaintiff has achieved the levels of completion that it claims.

[130] The plaintiff has provided a satisfactory explanation for the state of those works, especially the AGL works, the remote control monitoring system (RCMS) and the apron taxiway (see both letters of the defendant dated 25 May 2012 and 28 May 2012); that such works are either incorrectly listed or such works are not due since they form part of section 2 or section 3 works.

[131] As for the matter of testing and commissioning brought up by DW1, PW2's explanation that T&C is carried out after all three sections have been completed, makes good sense especially when there is no rebuttal evidence from the defendant. T&C in any case was only referred to as 'related T&C', and not in the terms now described by DW1. The evidence shows that at the

material time, the defendant was not concerned with the matter of T&C. These were only arguments made or raised at trial. In any event, the explanations given by PW2 are reasonable; that the T&C need only be done after section 3 and the relevant works had been completed. The use of existing cables and other measures for the works are intended to be as an 'interim only' as required and stipulated for section 1. This explanation must have always been the position and it is for this reason that the failure or lack of T&C was not an issue or material issue in the CNC.

[132] Most materially, I am satisfied that the section 1 works were substantially and practically completed because the airport re-opened to full 24 hour operations which was unrestricted. Both PW1 and PW2 testified that the airport was fully operational on a 24 hour basis from 1 May 2012. Both witnesses testified that this would not have been possible had the section 1 works not been substantially completed on 30 April 2012. Both witnesses further testified that the airport had unrestricted operations in terms of loading and simultaneous manoeuvring of Boeing 747 as well as other aircrafts at airside as per the government's needs statement requirements.

[133] The defendant had responded through DW2 and DW3 that the fact that the airport was operational 24 hours did not amount to anything. This is because the plaintiff is said to have been fully aware that the works were being carried out in an active airport environment. In other words, the airport would remain operational except for a six hour shutdown to enable the plaintiff to carry out its works. Furthermore, when the airport was reopened to operate on 24 hours, the airport used existing infrastructure and equipment which the plaintiff was obliged to change or install new infrastructure and equipment under the terms of the principal agreement. When the plaintiff did not complete as required, the defendant is said to be justified in terminating the agreements and imposing LAD.

[134] With respect, the court disagrees. Aside from the percentage of completion levels that the court finds proved, the court finds the reopening of the airport to operate on a 24 hour unrestricted basis, approved by the relevant authorities such as DCA and MASB relevant and material to the question of whether the plaintiff has achieved substantial completion of section 1 works. I do not find the use of existing equipment or infrastructure as negating that finding given that the plaintiff has offered a satisfactory explanation as to how the various works under the three sections are to be implemented. The evidence indicates that the defendant was able to put the airport into 24 hour operation unimpeded and that it allowed Boeings 747 to land. This is significant over and above the fact that the parties were aware that the airport was an active one and would continue to be in use throughout the period of construction.

[135] The plaintiff's witnesses have adequately explained that the defendant's concerns as reflected in its government needs statement, that the whole object or purpose of the works was to upgrade the existing facilities so that KKIA could cater for unrestricted operations of bigger aircrafts such as the Boeing 747-400 was met on the promised date of 30 April 2012. There is uncontroverted evidence before the court that the airport was indeed operating on such unrestricted conditions.

[136] Although the defendant has sought to explain that the works were carried out in an active environment, and that the plaintiff was aware of it, there is a significant and material difference here which cannot be ignored; and it remains unexplained by the defendant. With effect 1 May 2012, there was no longer a need to shut down or restrict operations for six hours every day. If that be the case, I cannot see how the use, occupation and operations of KKIA is not a relevant factor in considering whether substantial or practical completion has been achieved by the plaintiff as claimed. The fact that the airport operated on unrestricted 24 hour basis must surely mean that any of the works itemised in the CNC and in the subsequent letter of 28 May 2012, if relevant for section 1, and not for section 2 or section 3 as explained by PW1 and PW2, were only minor works. Such outstanding minor works did not render the other works which have been completed, not substantially completed.

[137] The court is therefore satisfied that the plaintiff has proved its case on the law and on the facts. The plaintiff has indeed achieved substantial completion of section 1 works on 30 April 2012 to merit the issue of CPC and the consequential release of 50% of the performance bond that it had put up initially. That being the case, the defendant was in breach of the principal agreement by failing to issue the CPC. Consequently, the defendant had no right to impose any LAD for section 1 works.

[138] In view of the court's findings on the first issue, the subsidiary issue on the holding out does not arise; and it need not be considered.

[139] A final matter here concerns the defendant's call on the performance bond. The plaintiff claims that the defendant is in breach of agreement in making the call and it is now seeking a full refund of the performance bond.

[140] In the pleadings, the plaintiff claims that the defendant is only entitled to call on the performance bond 'if, and only if' the plaintiff has failed to observe and perform under the principal agreement; and any such liability must only be to the extent of which the plaintiff had failed to observe and perform under the principal agreement. In other words, the defendant's entitlement is subject to the defendant proving that the plaintiff is in breach; and the defendant proving its losses. In submissions, learned counsel for the

plaintiff claims that the defendant is not entitled to call on any amount under the performance bond because the defendant is itself in breach by reason of the holding out agreement; and that the defendant has not proven that it had suffered any loss.

[141] In defence, the defendant has reiterated that the plaintiff did not achieve substantial completion; that there was no holding-out agreement; and that the call was by reason of the plaintiff failing to perform their responsibility under the principal agreement; especially cl 10. By the time of the call, the completion dates for section 2 and section 3 works had long passed and it was clear that the plaintiff had not completed those works.

[142] In relation to section 2 works and later section 3 works, the evidence shows that the plaintiff had not completed by the agreed dates. In fact, the plaintiff ceased work and terminated the principal agreement with the position under section 1 works. LAD was then imposed for such non-completion. When the plaintiff failed to complete section 2 works, the defendant then imposed LAD at the rate found in the SA for section 2 works. Subsequently, the defendant terminated the principal agreement when it became obvious that the section 3 works too would not be completed. The call on the performance bond was then made the following year.

[143] In my view, the plaintiff was obliged to carry on to completion section 2 and section 3 works even where the defendant is in disagreement with the plaintiff over the status of completion of section 1 works. Given that the outstanding works under section 1 seen as minor works are now to be completed in section 2 and section 3, the parties' intention is that the plaintiff was always to complete those works, the latest by the end of section 3 works. It was never the parties' intention that the plaintiff did not have to complete such outstanding minor works or did not have to complete section 2 and section 3 works at all. Therefore, the plaintiff could not terminate but was obliged to nevertheless complete section 2 and section 3 works.

[144] Put it the other way round, the defendant is entitled to insist on completion of section 2 and section 3 works because that is what the parties had agreed. Where the defendant is in breach of cl 48.2 in not issuing the CPC and releasing half of the performance bond, the defendant is not entitled to impose LAD for the related works. The position of the other works however, remains unaffected.

[145] Therefore, the defendant is entitled to make the call as it was to offset the LAD. However, I agree that the defendant is still required to adduce evidence to prove its loss. Not a single piece of evidence on the defendant's purported losses has been adduced at trial to warrant the claim for LAD and the

sum forfeited under the performance bond. Although there is an agreed term on performance bond under cl 10, the loss still has to be proved and this is evident from the Federal Court's decision in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817; [1995] 2 CLJ 374. Hence, the defendant is not entitled to the LAD.

[146] In view of the above, the court cannot order the immediate return of the other half of the performance bond. The defendant is not entitled to forfeit the sum for want of proof. However, the return or the release of that half of the performance bond is governed under the terms of the performance bond itself, and that is, the balance is to be retained for a period of 12 months after the end of the defects liability period (see p 150). Since the plaintiff has completed section 1 works, the sum will have to be retained till that defects liability period lapse.

[147] Consequently, the court cannot order the return of that balance sum of RM18m of the performance bond. The court can only order the return of the first half of the performance bond.

Second issue who ought to bear the costs for the eia reports set out in para 51 of the statement of claim?

[148] In relation to the second issue; which is in relation to the costs of the EIA report it is the view of the court that such costs must be borne by the plaintiff. This claim relates to the four reports prepared by the plaintiff to clear EPD's concerns and which led to the subsequent SA.

[149] The defendant had rejected the plaintiff's claim through its letter dated 24 February 2012. The defendant was of the view that the plaintiff was obliged to bear the expenses related to the EIA studies. Although the initial sum claimed was RM554,880, the plaintiff is now claiming a sum of RM303,000.

[150] The plaintiff has referred to the various provisions of the Environment Quality Act 1974, the Schedule to the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 as well as the relevant provisions of the Environment Protection Enactment 2002 of Sabah and its Schedule of the Environment Protection (Prescribed Activities) (Environmental Impact Assessment) Order 2005, in support of its claim to be reimbursed for the related expenses in procuring the relevant studies.

[151] In a nutshell, it is the plaintiff's argument that the relevant laws require the application for approval from the EPD to be made by the 'Project Proponent', who undertakes the prescribed activity to select the appropriate environment consultant to prepare the necessary studies and reports. The

plaintiff claims that at all time, it was preparing for the 'Project Proponent' who cannot be anyone else but the employer or the defendant. It cannot be the plaintiff. Therefore, the plaintiff must be reimbursed for these costs or expenses.

[152] The defendant's refusal is because of the nature of the principal agreement; that because this is a design and build contract, the plaintiff had agreed to deal with such matters and costs. The fact that the application has to be made in the name of the owner etc does not detract from the contractual obligations agreed between the parties and that the plaintiff remains liable for such costs.

[153] I agree with the defendant. I cannot see how making any application for the sefendant, and that will extend to seeking any approval, alters the fact that such costs are to be borne by the plaintiff under the clear terms of the principal agreement. The fact that the defendant prepared the initial EIA report does not alter this finding as that was prepared before the tender process and before the plaintiff was appointed.

[154] Further, the court finds that this change or this compliance for these reports was occasioned by the execution of the works within the provisions of cll 14.1 and 26.1 of the principal agreement:

> 14 PROGRAMME
>
> 14.1 Programme to be Submitted
>
> The Contractor shall submit to the Employer's Representative within twenty-eight (28) Days of the Commencement Date, in accordance with the Employer's Requirements and in a form acceptable to and for approval by the Employer's Representative, and in addition to any further requirements set out in the Employer's Requirements, the following documents:
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) a detailed method statement setting out the method and manner in which the Contractor intends to Execute the Works.
>
> (e) ...
>
> 26 COMPLIANCE WITH STATUTES, REGULATIONS
>
> 26.1 Statutory Requirements
>
> (a) The Contractor shall conform in all respects, including by the giving of all

notices, the procuring of all approvals and the paying of all fees, with the provisions of:

(i) any National or State Statute, Ordinance or other law, or any regulation, or bye-law of any local or other duly constituted authority in relation to the design or Execution of the Works; and

(ii) the rules and regulations of all public bodies and companies whose property or rights are affected or may be affected in any way by the Works;

(all such requirements to be so complied with being referred to in these conditions as the 'Statutory Requirements') and the Contractors shall keep the Employer indemnified against all penalties and liability of every kind for breach of any such provisions, provided always that the Contactors shall not in the compliance of his obligations herein offer for inspection any of the Works until the Works have been inspected by the Employer's Representative. Notwithstanding the abovesaid, the Employer shall be responsible for obtaining the requisite approval for the overall layout and land use of the Project Site.

[155] Clause 14.1 deals with the plaintiff's responsibility for the programme while cl 26.1 deals with the plaintiff's obligations on compliance with the law. In fact, cl 26.2 provides for the plaintiff's obligation to indemnify the defendant in the event the defendant had expended the same on the plaintiff's behalf.

[156] Since the EPD issue is very much related to the requirements which the plaintiff was obliged to meet, the court is in agreement with the defendant that the obligation of the plaintiff extends to bearing the related costs.

[157] The method of construction is entirely the plaintiff and therefore it bears responsibility as far as the related costs are concerned. It does not matter if the defendant is ultimately the project proponent as the parties had agreed on the scope of works; and that the plaintiff is responsible for both designing and building the contracted works. The plaintiff was appointed on that basis. While KLIACS may be supervising and approving the plaintiff's work, that does not detract from the fact that the contractual arrangements between the parties is that it is for the plaintiff to ensure that all laws are met. In so doing, the related costs are therefore to be borne by the plaintiff.

CONCLUSION

[158] In answer to the issues posed, the court answers the first issue in the affirmative. As for the second issue, the issue is answered in the negative.

[159] Consequently, the plaintiff's first prayer is allowed. Insofar as the second prayer is concerned, the court allows the declaration in the following terms:

that the imposition of LAD for section 1 works is wrongful and invalid and that the imposition of LAD for section 2 works is invalid for lack of proof of loss.

[160] The court further grants the third order of special damages of RM18m being half of the performance bond together with interest at the rate of 5%pa from the date of judgment to the date of realisation. This is the sum that should have been released had the defendant kept its end of the bargain.

[161] On the matter of costs, the court orders the defendant to pay the plaintiff costs of RM70,000 which is reasonable and fair considering amongst others, the issues involved, the number of witnesses called, the extent of research and work done; and, the time taken for trial.

Order accordingly.

Reported by Ashok Kumar